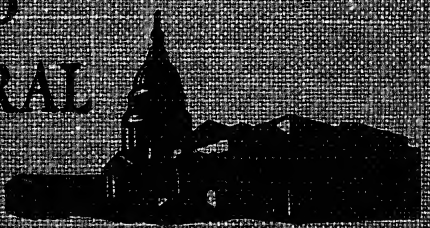
LABOR RELATIONS AND FEDERAL LAW



DONALD H. WOLLETT

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An Analysis and Evaluation of
Federal Labor Policy Since 1947

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TO MILDRED AND FRED

Preface

THIS MONOGRAPH is a discussion and a critical evaluation of federal labor policy in 1948. It is largely an analysis and a judgment of the Taft-Hartley Act, officially known as the Labor Management Relations Act of 1947, simply because that statute is currently the legislative cornerstone of our labor policy. The Wagner Act of 1935, which marked the entrance of the federal government on a large scale into the business of actively promoting the establishment of collective bargaining relationships, is freely alluded to, not only because of the light it sheds on the meaning of the Taft-Hartley Act but also because its underlying premises and policies are likely to shape the course of future labor policy. The victory of the Democratic Party in the 1948 presidential election suggests that the Taft-Hartley Act as such may shortly pass into history. But the issues with which it deals will remain with us, and our basic labor law of tomorrow, while it very likely will be built on the Wagner Act, will also almost certainly reflect the experience under the Taft-Hartley Act.

This study is based on the following premises:

1. Collective bargaining is the most effective device for spanning the schism between organized labor and management in a free economy, and collective bargaining, while its establishment and maintenance is in the public interest, is not essentially a government function.

2. The administrative process is a more useful and just device for achieving economic objectives which are in the public interest than criminal or civil law.

3. The necessary workings of the administrative process should not be impeded by uncritical adherance to slogans of procedural due process or by deification of the judicial process.

4. The National Labor Relations Board should not be singled out for special procedural treatment.

5. Existing institutions which have helped in many instances to establish and maintain stable industrial relations, e.g., the closed shop, should not be destroyed by resort to conceptualistic arguments.

6. Statutes, particularly those which contain criminal law sanctions, should be so carefully and precisely worded that any reasonable man can know in advance whether his conduct is lawful or unlawful.

7. Law is not the same thing as order, and a statute which is unacceptable to a large number of people creates law evaders, e.g., the Volstead Act, and raises problems of enforcement which strain the administration of justice within the framework of a democratic society.

8. Establishing substantive rights on one hand while rendering them, by setting up procedural hurdles and priority devices, partially useless on the other hand is not a characteristic of good legislation.

Without the assistance, advice, and prodding of John S. Harlow, Seattle attorney, the work would never have been completed. The author is also heavily indebted to Professor Ivan C. Rutledge of the University of Washington School of Law and to Dr. Ralph I. Thayer, Professor of Economics at the State College of Washington and formerly Assistant Director of the University of Washington Institute of Labor Economics, for very valuable criticisms and suggestions. Daniel Dimick, formerly Chief Legal Officer in the Nineteenth Region of the National Labor Relations Board, and Patrick Walker, who now occupies that position, Dr. William S. Hopkins, Director of the University of Washington Institute of Labor Economics, Dean Judson F. Falknor of the University of Washington School of Law, and Henry T. Buechel, Professor of Economics at the University of Washington, were very helpful. The enterprise would have collapsed without the assistance of Pauline Player, Pat Larrowe, and Betty Peistrup, who prepared the manuscript.

None of the above-mentioned persons are necessarily in accord with, or even sympathetic to, the viewpoints expressed and the value judgments passed. They are the sole responsibility of the author.

DONALD H. WOLLETT

December 1, 1948
Seattle, Washington

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I. ECONOMIC POWER AND COLLECTIVE BARGAINING—A RATIONALIZATION

THE UNDERLYING THESIS of this critique is the notion that we are irrevocably committed to a federal labor policy of encouraging the establishment and maintenance of collective bargaining relationships. The economic wisdom of collective bargaining as a policy is beyond the scope of this discussion, but some observations seem appropriate.

Collective bargaining means, among other things, price-fixing in the labor market on a large scale. This is perhaps a strange kind of activity to encourage in the light of our historical lip-service to the notions of free competition. Yet we have never been quite sure whether competition means price competition or "fair" price competition, or whether a free market means one in which prices are free from both private and public controls or one in which businessmen are free to destroy their competitors and impose their own controls.

Even under the Sherman Act the courts have historically been more concerned with the abuses of private price-fixing than they have been with private price-fixing itself.

It seems reasonably clear that the Sherman Act has not prevented the concentration of corporate power. The rapid growth of vast corporate empires has produced an economy in which more and more people depend upon fewer and fewer people for their economic welfare. In 1944, 31 per cent of the workers in manufacturing were employed by firms with 10,000 or more employees; 62 per cent were employed by firms with 500 or more employees. It is not surprising, therefore, that workers have sought some control over their own destinies by forming powerful trade unions.

Among other things, the trade-union is the workers' private device for getting a larger share of the national income. And it seems fair to say that we have helped to make the large-scale development of this institution inevitable (and economically necessary) by permitting the tremendous growth of the corporate structure as the businessman's device for getting a larger share of the national income.

In addition to the political difficulties involved in establishing "free" labor markets by emasculating a trade union movement with approximately 15,000,000 members, we face the fact that such a policy would probably be economically unsound unless it were coupled with limitations on corporate power achieved by limiting corporate size.

Paragraph two of Section 1 of the Wagner Act made the point:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stablilization of competitive wage rates and working conditions within and between industries.

Pumping purchasing power into the hands of the mass of consumers in order to convert desire into effective demand and implement the achievement of high levels of production and employment is certainly not a problem in 1948 (as it so clearly was in 1935). But the distribution of income problem remains. The point which the labor force's percentage take of the national income must hit in order to sustain effective demand for our national product is speculative and highly controversial, but surely the fact that the percentage of the national income which goes into wages and salaries has declined since 1945 and is approaching the level of 1929 is a source of some concern.[1]

Fiscal policy, including the progressive income tax device, is a method for implementing the achievement of an equitable and

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[1] The following table is from *Survey of Current Business,* July, 1947, supplement and February, 1948, issue. Columns 1 through 3 are expressed in billions of dollars; columns 5 and 6 indicate the per cent of national income.

	National Income	*Wages and Salaries*	*Net Corporate Profits*	*Wages and Salaries*	*Net Corporate Profits*
1929	$ 87.4	$ 50.2	$ 8.4	57%	9.6%
1933	39.6	28.8	−0.4	73	—
1939	72.5	45.7	5.0	63	6.9
1940	81.3	49.6	6.4	61	7.9
1941	103.8	61.7	9.4	59	9.0
1942	136.5	81.7	9.4	60	6.9
1943	168.3	105.5	10.4	62	6.2
1944	182.3	116.9	9.9	64	5.4
1945	182.8	117.6	8.9	64	4.2
1946	178.2	111.1	12.5	62	7.0
1947	202.6	122.8	17.4	61	8.6

sound distribution of income. But the Eightieth Congress partially rejected this philosophy, with the result that the take of the national income which any man or group gets is even more clearly a function of economic power than it was before. The fact remains in 1948, then, that workers cannot expect to get the share which they need in order to sustain their standards of living (and which the requirements of a full employment-full production economy demand that they get) without their own instrument of economic power, the trade-union.

In summary, it seems politically impossible and economically impracticable to emasculate the trade-union as an instrument of economic power unless the other great instruments of economic power—chiefly the corporation—are similarly emasculated. But who is to advocate, in a world situation where volume production is an urgent necessity, the economic atomization of the productive structures that dominate steel, rubber, oil, and automobiles?

Organization seems to be the immediate answer for the consumer and the nonunion worker. Thus we have erected, and are continuing to erect, an economy which will function effectively only so long as powerful private economic groups can agree and in which the unorganized groups must protect themselves from exploitation either by organizing or by granting vast amounts of regulatory power to a centralized government (with the hope that the grant will not become irrevocable).

This is the kind of economy in which the government must be highly centralized, more powerful than any of the economic organizations within it, and able to maintain a balance of power, to restrict the private economic groups within it to the "reasonable" exercise of their powers, and to invoke—when necessary—the coercive power of the state to compel both agreement and compliance.

We can hope that all groups will remain "reasonable"—that is, follow enlightened wage and price policies (or, at least, that when the state does exercise its coercive power, the groups are more patriotic than "unreasonable") and that the government (and the men who run it) with all of its (and their) power will be wise, sensitive to the common weal, and willing to relinquish power should the electorate demand relinquishment.

Those libertarians who believe that power always corrupts and that economic and political freedom are indivisible take a dim

view of the future. Yet the trend seems clear, and until we determine to strike at private concentrations of power wherever they exist (a determination probably as impracticable in the near future as it is unlikely) collective bargaining belongs in our economic picture.

II. THE IMPLICATIONS OF COLLECTIVE BARGAINING

There are four considerations which must be recognized *legislatively* if collective bargaining is to be our federal labor policy:

1. *A particular plant cannot be expected to exist part union and part nonunion.*

It is neither equitable nor realistic to expect a union to bargain collectively for all employees, when only part of the employees support the union.

It is inconsistent to expect a union to be responsible for the adherence of the employees to the terms of a collective agreement (for example, a no-strike promise) without permitting the union to have effective disciplinary controls over the employees, one of the most important of which is some form of union security.

It is illogical to expect a union to reflect the kind of responsibility for, and interest in, industrial stability which comes from institutional security without permitting the union to protect itself from attempts by the employer and other unions to undermine its bargaining position and destroy or weaken its status. And one of the most important union protections against such attempts is, again, some form of union security.

Encouraging collective bargaining means permitting union security devices. For evidence to support this statement, examine the security of unions in England or the security of unions in those American industries where collective bargaining has reached a relatively mature stage (for example, the printing industry and the building trades, where the closed shop is well established).

2. *A particular industry cannot be expected to exist part union and part nonunion.*

Employers who pay union wages are generally (assuming that nonunion wage scales are lower) at some disadvantage if they must compete in the products market with employers who pay nonunion wages. Either the union wage scale has to be reduced, or the employer has to find ways to offset the disadvantage of his higher labor costs, or the nonunion plants have to be organized.

Congress recognized this fundamental fact when it passed the Norris-LaGuardia Act in 1932. This statute made it clear that a union is involved in a labor dispute and thus immunized from the federal injunction if it is organized in the industry in which the dispute occurred, even though it has no members in the particular plant against which it is directing economic pressure. Some states and some state courts have followed this lead.

3. *The individual freedom in modern industrial life which is important is not the freedom of the employee to refuse to join a union and thus to remain subject to unilateral bargaining with the employer (an illusory kind of freedom), but the freedom of the employee to choose the union he wants, to exercise some controls and checks over the leadership of that union, and—at periodic times —to campaign to change unions.*

The analogy to political freedom is not too tenuous to have validity. Working through legislative representatives in government is not so very different functionally from working through bargaining representatives in industry. We have long since recognized that the important political freedom is not the individual's freedom to refuse to participate (in fact, we recognize such a refusal as dangerous and attempt to discourage it) but the individual's freedom to participate in the way he chooses.

Acceptance of the fundamental importance of this kind of freedom means several things:

a. Employees should be protected at the organizational level from being coerced into joining a union not of their own choice.

b. Unions should be open to all qualified workers (but a worker is not automatically qualified simply because he has the price of the initiation fee).

c. Union members should have some guarantees that periodic and reasonably frequent elections by secret ballot will be held.

d. Union members should have some guarantees that union funds are being handled properly.

e. Union members should have some guarantees that periodic and frequent meetings, at which they can express criticism of, and opposition to, the union leadership, will be held.

f. Union members should have available to them some procedures for altering the union constitution, possibly by initiative.

g. In situations where the union exercises control over employment, union members should be guaranteed fair treatment with respect to job placement.

h. Union members should have some substantive and procedural protections against arbitrary expulsion. For example, criticizing union officers and organizing opposition to union officers should not *per se* be grounds for expulsion. (But a refusal to pay dues and fees is not the only valid cause for expulsion.)

i. Employees should be free to campaign to replace an unsatisfactory union with another union, but only at periodic times and then by resort to peaceful procedures which dignify the wishes of the employees whom the incumbent union represents and the challenging union seeks to represent.

These guarantees can probably best be implemented by permitting direct appeals to an administrative agency (like the National Labor Relations Board), with review by an appellate court.

Parenthetically it should be observed that many unions are operated very democratically. And the assertion that collective bargaining has merely resulted in the transfer of arbitrary power over workers from one set of bosses to another undoubtedly is an overstatement—usually made by persons basically hostile to unions, as a poorly disguised but palatably formulated attack on their existence or, at least, on their effective operation. But undemocratic unions do exist, and the argument that internal union affairs are of no concern to outsiders has been destroyed by the legislative promotion (in the public interest) of union growth and development, which has vastly increased the scope of union power.

4. *Particular collective bargaining relationships must be protected against assaults by unions as well as by employers.*

This protection means the imposition of legal restraints on the self-help activities of unions (including striking and picketing) when they are designed to force the destruction of a particular collective bargaining relationship which involves a "legitimate" union and has been established by reference to the wishes of the employees.

(A "legitimate" union, as the term is used here, means one that is not assisted or dominated by an employer.)

Specifically, then, economic pressure directed by a union against an employer should be proscribed by law if it is designed (a) to force his employees to move from the union they have selected to the union exerting the pressure, (b) to force him (the employer) to discharge his employees who have selected one union and replace them with employees who belong to the pressuring union, or (c) to force the employer to bargain with the pressuring union instead of the union which his employees have selected as their bargaining agent.

III. THE RECENT DEVELOPMENT OF COLLECTIVE BARGAINING AS FEDERAL LABOR POLICY

The passage of the Norris-LaGuardia Act by Congress in 1932 withdrew from the federal courts the most effective remedy for those persons injured by the activities of trade unions—the injunction. This statute, designed to correct judicial abuse of the equity power to issue injunctive relief in labor cases—an abuse well established by the historical record, took the federal judges out of the business of regulating trade-union conduct through the indiscriminate issuance of restraining and injunctive orders. Its passage was the product of many years of agitation by nonunion as well as union groups, and unlike its predecessor—Section 20 of the Clayton Act of 1914—the Norris-LaGuardia Act achieved its sponsors' purpose.

The most serious objections to the use of injunctive orders in labor cases arise from the issuance of a temporary or preliminary decree prior to the full trial of the case. Traditionally such an injunction is an extraordinary remedy granted only in those cases where irreparable harm to the petitioner's property (usually tangible) will be suffered unless an order holding the defendant in "status quo" is granted and continued in effect until the respective rights of the parties are litigated.

While the temporary injunction may be a perfectly proper and equitable order to issue in cases involving continuing or threatened injury to real property, its general use in labor cases was subject to grave abuses. First, it might be issued by the court without notice and hearing to the union or its leaders merely upon a prima facie showing by the employer, through affidavits, that he would suffer irreparable harm to his business unless the striking and picketing

were prohibited. Second, it was based on "tentative" rather than "ultimate" truth. Because the effective use of a union's economic weapons depends largely on timing, the issuance of the preliminary order accomplished, as a practical matter, a settlement of the controversy between the union and the employer in favor of the latter. The final determination of the legality of the union's acts on the basis of proved facts established at the trial was relatively meaningless. Third, the preliminary order had to be obeyed by the union leaders unless they wished to subject themselves to the risk of summary punishment at the hands of the judge (without jury), even though the order was erroneously issued in the first place against conduct subsequently found to be lawful. Four, historically the orders were very broad, occasionally restraining all persons "whomsoever" from interfering in any way "whatsoever" with the employer's conduct of his business. Thus, persons who were in no way connected with the union and had not been parties to the suit or even notified of the existence of the injunction might be held in contempt for very indirect interferences with the employer's business.

Fifth, the substantive law by which the legality of a union's conduct would ultimately be determined was characterized by confusion and uncertainty. As a result union leaders had no reasonable knowledge of what the legal rules of the game were until it was too late. Moreover, the decision to issue an injunctive order lay entirely within the discretion of the judges without any clear and well-defined body of law acting as a check on the exercise of that discretion. As a result, particularly since large numbers of judges were hostile to trade-union objectives and aspirations anyway, injunctions were frequently issued against lawful conduct. Sixth, since a labor injunction involves the restraint of human conduct on a fairly large scale, its broad use was felt to be out of phase with the Anglo-American notion that, in terms of minimizing restraints on freedom of human conduct, it is wiser to permit people to commit acts and pay damages to the injured party if the conduct turns out after full trial to be illegal than to prevent persons from committing those acts in advance of a determination as to their legality.

The negative encouragement of the development of trade-unionism reflected in the Norris-LaGuardia Act was followed in 1935 by the Wagner Act, which put the federal government into the business of actively and positively promoting the establishment of collective bargaining relationships. The rationale for this govern-

mental activity was largely the purchasing power—distribution of income theories mentioned above and the result was a tremendous expansion in the size, scope, and strength of trade-unions.

The United States Supreme Court made its contribution (a negative, but nonetheless an effective, one). First, it freed trade unions from the restraints of the Sherman Act except when the union and the employer collusively engage in price-fixing in the products or services market—and perhaps as a practical matter it freed them even in that situation. Second, it identified peaceful picketing, a very effective economic weapon, with free speech, and thus immunized it—at least in part—from legislative and judicial controls.

The place of the Taft-Hartley Act in this developmental sequence on the federal level is the principal subject at hand.

But first we should take a general look at its predecessor—the Wagner Act.

IV. THE WAGNER ACT—GENERAL ENDS AND MEANS

Paragraph two of Section 1 of the Wagner Act set out the economic justification for collective bargaining:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Paragraph one of the same section set out the constitutional justification for the statute:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining leads to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce by . . . [among other things][2] causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

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[2] Material in brackets by the author.

ENDS

To summarize and paraphrase, the Wagner Act was intended to achieve three primary public policy objectives:

1. Prevention of depressed wage rates which decrease the purchasing power of wage earners and aggravate business depressions.

2. Encouragement of the stabilization of competitive wage rates and working conditions within and between industries because instability aggravates business depressions.

3. Removal of certain causes of industrial strife (e.g., interference with the organization of employees and refusal to bargain collectively) because (a) industrial strife burdens and obstructs commerce and (b) it diminishes the volume of employment and wages which in turn impairs the market for goods in interstate commerce.

MEANS

To achieve objectives 1 and 2, the establishment of collective bargaining relationships was set out as our federal labor policy. The chief task of the National Labor Relations Board was to encourage the practice and procedure of collective bargaining. Operating from certain implied premises (not articulated in the Act), the statute empowered the National Labor Relations Board to do certain things in order to encourage the practice and procedure of collective bargaining:

1. *Premise*: collective bargaining cannot achieve the public policy objectives unless large numbers of employees are represented by strong unions. *NLRB* task: to protect employees so that they may join unions and/or designate them as their collective bargaining representatives free from employer interference.

2. *Premise*: the collective bargaining process envisages labor unions which represent the interests of employees, not employers. *NLRB task*: to insist that labor unions free from employer domination or interference are established as collective bargaining agents.

3. *Premise*: the collective bargaining process necessitates that labor unions be permitted to protect their institutional life by agreement with employers because collective bargaining is a continuous process. *NLRB task*: to permit union security agreements to exist and be enforced.

4. *Premise*: the collective bargaining process envisages labor unions which *exclusively* represent *all* employees in the bargaining

unit. *NLRB task*: to see that a union which is the bargaining representative represents *all* employees; to insist that a union is the *exclusive* bargaining representative; to prohibit a union from perpetuating itself in power against the wishes of a majority of the employees.

5. *Premise*: the collective bargaining process requires unions to be responsible for the adherence of the employees whom they represent to the agreement negotiated. *NLRB task*: to permit union security agreements to exist and be enforced.

6. *Premise*: the collective bargaining process is being resisted by employers, not unions. *NLRB task*: to prevent employers from resisting the practice of collective bargaining.

7. *Premise*: the collective bargaining process itself is essentially a private matter and the terms of agreements and the actual achievement of public policy objectives 1 and 2 rest on the private parties (employers and unions), not on the government. *NLRB task*: to avoid interfering with the bargaining process itself except insofar as it violates one of the premises.

8. *Premise*: the collective bargaining process is a farce unless unions are strong; strong unions must have strong economic weapons. *NLRB task*: to avoid interfering with, impeding, or diminishing the right to strike (although the NLRB did make certain types of strikes unattractive to employees by refusing to reinstate them, or —to put this another way—by permitting the employer to discharge them with impunity).

To achieve objective 3, the Wagner Act empowered the National Labor Relations Board to do two things:

1. *Premise*: orderly procedures must be established for determining which union, if any, is to be the collective bargaining representative of the employees. *NLRB task*: to determine, following statutory or other appropriate procedures, which union, if any, the employees wish to represent them.

2. *Premise*: certain kinds of employer conduct have caused labor disputes and industrial unrest. *NLRB task*: to proceed against employers who engage in five kinds of unlawful conduct—called unfair labor practices.

V. PUBLIC AND PRIVATE LAW

An analytical tool helpful for the dissection of a statute can be built by carefully defining legal rights and duties. A legal duty is something which must be done or must not be done in order to avoid legal liability. The person to whom the duty is owed holds the correlative right. To put this another way, a legal right is simply the ability to obtain from some dispute adjuster (a court or an administrative tribunal) a penalty or a remedy because the correlative duty has been violated.

Duties may be, for the purpose of analysis, broken down into two convenient categories: public duties and private duties. A public duty is an obligation owed to the state, the duty having been established because it was believed to be in the public interest. In all cases of public duties, the holder of the correlative right is the government, with some public agency or officer, e.g., the National Labor Relations Board or the Attorney-General of the United States, having the authority to attempt to enforce the right. A private duty is an obligation owed to some other private party. In all cases of private duties, the holder of the correlative right is some other private party, e.g., the promisee in an ordinary commercial contract.

The distinction between public and private duties is important under the Taft-Hartley Act. Title I, which amends the Wagner Act by substantially rewriting it and may be called The National Labor Relation Act of 1947, sets up unfair labor practices. The obligation not to commit an unfair labor practice is a public duty, established in the public interest. The potential right-enforcer is the General Counsel, working through regional directors. Only he can seek a remedy or penalty from or against the person who has committed an unfair labor practice. For example, a certified union with whom the employer refuses to bargain collectively has the right to ask for an affirmative order directed against the employer. But since this right is meaningful only if the regional director (the General Counsel's agent) picks up the union's charge and issues a complaint, and the trial attorney (also controlled by the General Counsel) successfully prosecutes the employer and obtains an order from the Board, the General Counsel, not the union, has the right. The same thing is now true with respect to an employer with whom a certified union refuses to bargain collectively.

If an employee is discharged pursuant to an illegal union security agreement, e.g., a closed shop, he is entitled to ask for reinstate-

ment. But all he can do is file a charge with a regional director. Only if the regional director issues a complaint and the trial attorney successfully prosecutes the offending party and obtains an order of reinstatement, has the employee anything of value. Unions and employers owe their duties under the National Labor Relations Act to the government, as represented by the General Counsel, not to the employees.

Therefore, the only right that a private party acquires under Title I of the Taft-Hartley Act is the right to ask a regional director to take action. This is not the same thing as a private person's right to seek redress in court. That person can appeal to a review court if the trial court sustains a demurrer. (In a civil or criminal action the party who enters a demurrer says in effect to the other party, "Even if the facts you allege are correct and you can prove them—so what? They show no violation of the law.") The charging-party turned down by a regional director can appeal only to the General Counsel, the regional director's superior. (And this appeal is not, as a practical matter, apt to be worth very much. In most cases the regional director receives advice from the General Counsel before he refuses to issue a complaint. As a consequence, an appeal to the General Counsel is usually nothing more than a request that he reconsider a decision he has already made.)

Title III of the Taft-Hartley Act sets up both public and private duties. Violation of the former in these cases is a crime, with the penalty being imposed at the conclusion of court proceedings initiated by the federal government. Since the potential right-enforcer is a public agent, the right again is public in character.

Violation of the latter gives rise to a cause of action, e.g., breach of a collective bargaining agreement. A cause of action is a private law matter. The right-holder in these instances is the person to whom the duty is or was owed, e.g., the promisee in a collective bargaining agreement. Only that party can seek a remedy from the person who violated the duty. By so doing he initiates what is commonly called a lawsuit.

PART I

The National Labor Relations Board and Its Operation

CHAPTER I

Structure and Procedure

AFTER ITS INCEPTION in 1935 the National Labor Relations Board was, although it followed a procedure similar to that of other administrative tribunals, e.g., the Federal Trade Commission, sharply criticized for the way in which it did its job. These complaints centered to a large degree around matters of structure and procedure. Their full meaning cannot be grasped without an understanding of how the machinery of the Board operated under the Wagner Act.

When a charge of an unfair labor practice was filed by any person or labor organization with a regional office, a member of the field staff, either a field examiner or an attorney, investigated—notice having been given to the accused. The investigating agent either (1) negotiated an informal settlement subject to Board approval; or (2) requested withdrawal of the charge; or (3) recommended to the regional director that he refuse to issue a complaint, such refusal being subject to review before the Board if requested by the complaining party within ten days; or (4) recommended to the regional director that he issue a complaint.

Nominally the complaint was issued by the Board, although actually the regional director issued it—occasionally asking the Board's advice.

The complaint, which was served on both the defendant and the charging party, listed the charges against the former, who was given at least ten days notice of the time and place of hearing and ten days in which to file an answer. At the hearing a trial examiner working directly out of Washington presided, with full power to subpoena, administer oaths, call and examine witnesses, and receive evidence. A trial attorney working out of the regional office prosecuted the complaint, and the defendants and other parties (the charging-party and interveners) had their own counsel. Both the trial attorney and the parties had opportunity to call, examine, and cross-examine witnesses and to introduce other evidence.

At the conclusion of the hearing the trial examiner submitted an intermediate report to the chief trial examiner, who transmitted it to the Board. This report contained his findings of fact, his reasons for reaching them, and his recommendation either that the complaint be dismissed or that action against the defendant be taken.

Copies of the intermediate report were served on the parties. The Board then ordered the case officially transferred to it—with copies of this order to the parties. Within fifteen days after service of this order, the parties and/or the trial attorney could file exceptions and a brief. In the event that the defendant filed exceptions and a brief to an intermediate report which recommended action against him, the other parties and/or the trial attorney could file a brief in support of the report. Copies of all exceptions and briefs were served on all parties. Within ten days any party (but not the trial attorney) could make a request (usually granted) to argue orally before the Board.

When the Board received the intermediate report, it referred it to one of its ninety-odd review attorneys. He analyzed the report and submitted to the Board a memorandum, which included an outline of the evidence and a statement of the major issues raised by the exceptions. The Board then heard oral argument by the parties. The review attorney then gave the Board a full report of the matter, and the Board took final action (actual drafting of the opinion after the Board had made up its mind was done by the review attorney).

In general the NLRB did one of three things: (1) stated its findings of fact and either issued a cease and desist order and/or ordered such affirmative action, e.g., disestablishment of a company union or reinstatement of a discriminatorily discharged employee with back pay, as was necessary to effectuate the objectives of the Wagner Act; (2) stated its findings of fact and ordered a dismissal; (3) reopened the record and ordered the receipt of further evidence. In making its decision the Board could either follow the recommendations of the intermediate report or "make other disposition of the case."

If the defendant refused to comply with the order, the Board could ask the appropriate federal circuit court of appeals for temporary relief, e.g., a temporary injunction (in fact the Board very rarely sought preliminary injunctive relief), and an order of en-

forcement—the violation of which would be contempt. Any party aggrieved by a final order of the Board could get a court review at his own instance by appealing.

Once the matter got into the circuit court on review, the court gave notice to the other party or parties; the record, including pleadings, testimony, findings, and the order, was filed; argument was heard; and the court decided the following, if in issue: Did the NLRB have jurisdiction? Was there a fair hearing? Did the findings and the rulings rest on evidence, that is, was there such relevant evidence as a reasonable mind might have accepted as adequate to support the conclusions? Was the Board's interpretation and application of the NLRA correct? Was the Board's order appropriate?

The review court (which was supposed to hear such matters expeditiously) had the power to grant temporary relief and to enter a decree enforcing, modifying, or setting aside the Board's findings and order—in whole or in part. Or it might remand the case to the Board for further proceedings.

Althought the United States Supreme Court—at the time when it had no Roosevelt appointees—upheld this procedure as constitutional by a 5 to 4 vote, it was almost constantly under attack. The attackers achieved considerable success in the Taft-Hartley Act. However, except for the specific changes noted below, procedure before the NLRB in complaint cases still follows the general pattern set by and under the Wagner Act.

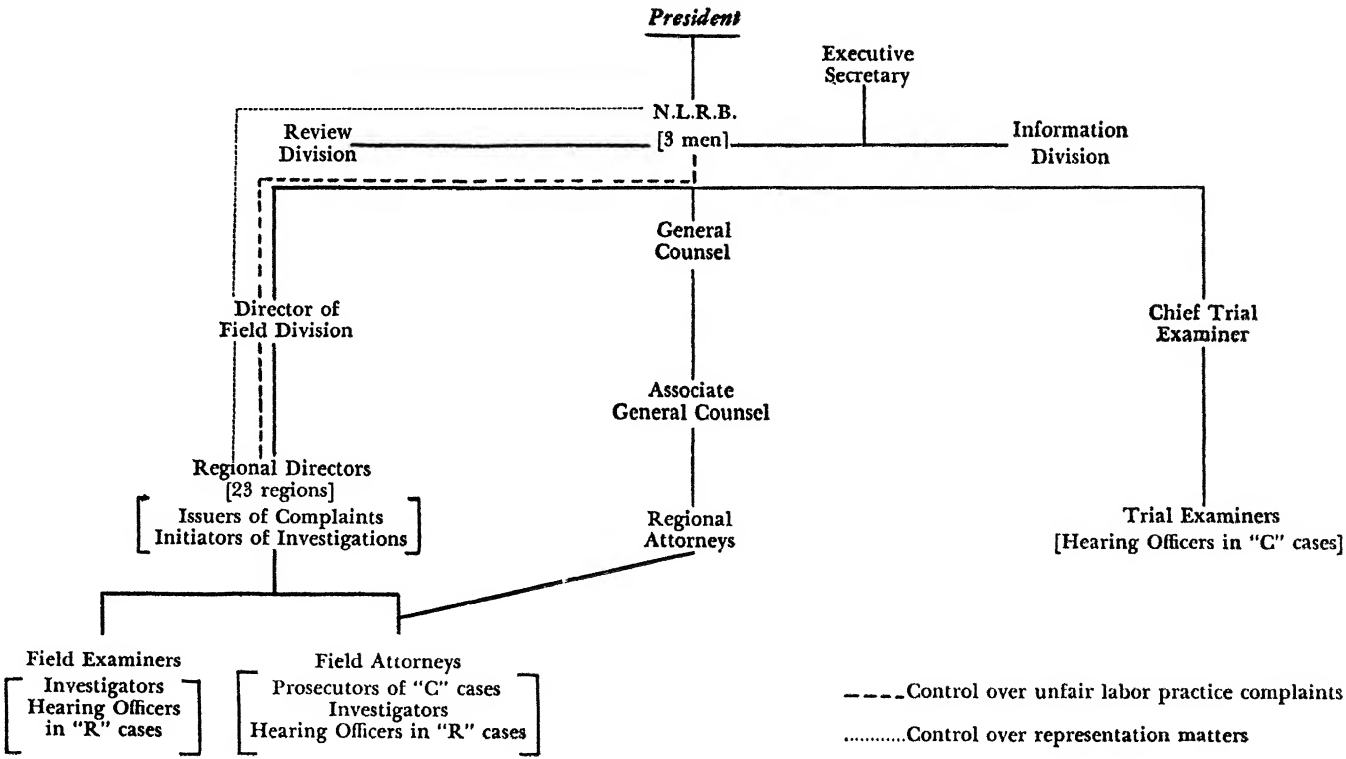
COMBINATION OF FUNCTIONS

The most common and effective complaint directed against the Board under the Wagner Act was that it combined the functions of investigation, prosecution, and adjudication.

Although this argument bothered some Board supporters, its most eloquent proponents were management lawyers. This was hardly surprising, since the Board's job was to achieve the public policy objectives of the Wagner Act, and the Board could not do this job without regulating the employer group.

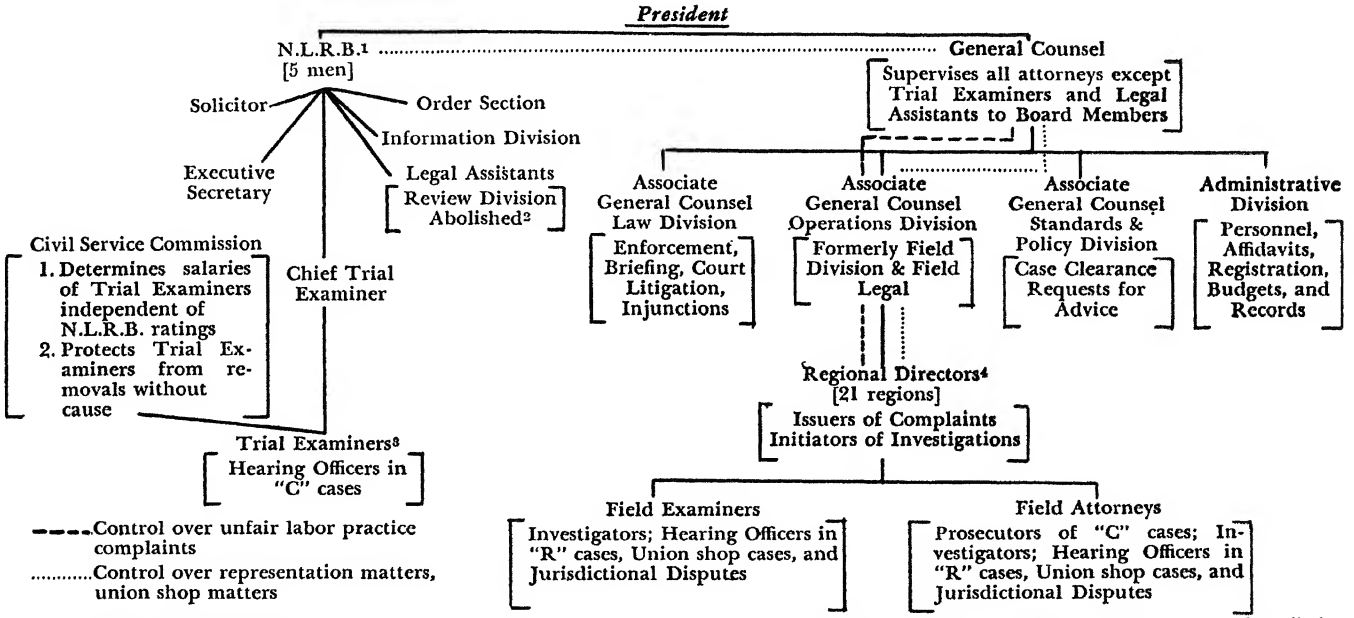
In general the argument ran as follows. Outside parties file charges with the NLRB that an employer has committed an unfair labor practice—this is analogous to a private person filing a charge with a prosecutor that a crime has been committed. The Board investigates the charges, as a prosecuting attorney does when a crime

WAGNER ACT


President
Executive Secretary
N.L.R.B.
[3 men]
Review Division
Information Division
General Counsel
Director of Field Division
Chief Trial Examiner
Associate General Counsel
Regional Directors
[23 regions]
Issuers of Complaints
Initiators of Investigations
Regional Attorneys
Trial Examiners
[Hearing Officers in "C" cases]
Field Examiners
Investigators
Hearing Officers in "R" cases
Field Attorneys
Prosecutors of "C" cases
Investigators
Hearing Officers in "R" cases
----Control over unfair labor practice complaints
.....Control over representation matters

TAFT-HARTLEY ACT

[and Administrative Procedure Act of 1946]



[1] Can be removed by the President upon notice and hearing only for neglect of duty or malfeasance in office. Any group of three or more has all the powers of the Board itself.

[2] No persons other than a Board member or his legal assistant can (a) review transcripts of hearings, (b) prepare drafts of opinions, (c) review a Trial Examiner's report.

[3] No Trial Examiner can consult with the Board on exceptions to his findings, rulings, or recommendations. Trial Examiners are free from the Control of the General Counsel, the Regional Directors, or their staffs.

[4] No Regional Director can participate in deciding or reviewing decisions on unfair labor practices.

is charged. The Board then considers the results of the investigation —its own investigation, as a grand jury does when it considers the results of a prosecutor's investigation. If the Board finds that probably an unfair labor practice has been committed, it issues a complaint—a function similar to that performed by a grand jury when it brings in an indictment. The Board then prosecutes the employer charged in the complaint, and the Board decides whether or not the employer is guilty as charged. Thus, the NLRB is engaged in "multiple impersonation"; it is functioning as investigator, prosecutor, judge, and grand jury. In short, from the time when an accusation of unlawful conduct is first made the Board does everything involved in the procedure except defend the employer. Such a procedure violates the standards of due process, particularly since the Board doesn't issue a complaint unless it thinks the employer is guilty, which means that it has made up its mind as to what its decision ought to be before the hearing starts.

The counter argument was equally clear cut. First, as a practical matter the Board conducts its investigations of charges filed through agents located in its approximately twenty regional offices scattered throughout the United States and its territories. As a result the three members of the Board usually don't hear of the charge until the case actually comes before them for a hearing. Second, 49 per cent of all charges filed in regional offices are disposed of favorably to the employer—that is, the charge is either dismissed by the regional director or withdrawn, at the suggestion of the regional director, by the party who filed it. Thus, no prejudice is indulged in against the employer. Over 42 per cent of the cases are settled in the regional office by agreement among the employer, union, and regional director—without resort to formal proceedings. Third, in the remaining cases, slightly over 8 per cent, in which the regional director issues a complaint, he isn't speaking for the Board in the sense that it has made up its mind as to the employer's guilt. He is speaking for the Board in about the same way a grand jury is speaking for the state of California when it brings in an indictment charging John Doe with a crime. Fourth, in the few cases in which the Board advises the regional director as to whether or not he should issue a complaint, it no more prejudices itself than a judge who rules on a demurrer does. A judge who overrules a demurrer says in effect to the party against whom it was filed, "If you can prove these facts, you have a good case." When the NLRB advises a regional director

to issue a complaint, it in effect tells him the same thing. The demurrer saves time and money in litigation because it avoids the waste involved in trying to prove facts which, even if proved, will not establish violation of a legal duty. Unless the NLRB is permitted to advise its regional directors confronted with novel cases as to whether or not certain facts, if proved, will be an unfair labor practice, time and money will similarly be wasted. Fifth, the Board does not prosecute the cases; an attorney from the regional office does. Sixth, the regional director who investigates the charge and issues the complaint does not sit in judgment on the case; a trial examiner working out of Washington, D.C. does. Seventh, the Board itself passes judgment on the trial examiner's findings and conclusions entirely on the basis of the record of the hearing held before the trial examiner. Eighth, if the employer has been unfairly adjudged guilty, he is protected by a court review.

Last, the procedures followed by the NLRB are similar to those followed by other administrative tribunals, and defendants are given protection against abuses not only by judicial review but also by the Administrative Procedure Act of 1946. Section 5 (c) of this statute, which was passed in part to protect respondents before administrative tribunals from the dangers of a combination of functions, says:

> . . . nor shall such [hearing] officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for an agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review except as witness or counsel in public proceedings.

Not only are trial examiners thus taken outside the "chain of command" by the Administrative Procedure Act, but they are also—elsewhere in the statute—made subject to the civil service laws and given protection against agency removal except for good cause as established and determined by the Civil Service Commission. And they are given even more freedom from agency control by the provision that guarantees them compensation prescribed by the Civil Service Commission independent of agency recommendations or ratings.

No matter what the merits of these arguments were or are, the fact is that the Taft-Hartley Act attempts to satisfy the critics by permitting the National Labor Relations Board to have authority only over trial examiners. Section 3 (d) shifts authority over the

regional directors, the field examiners, and the field attorneys to the Board's General Counsel, a direct appointee of the President (see chart). Thus, the function of adjudication is broken off sharply from the functions of investigation and prosecution. The Board continues to have the power, through its trial examiners, to decide whether or not a defendant is guilty (and it also retains authority over matters other than unfair labor practices, such as representation and union shop elections). But the General Counsel has the power, acting through the regional directors, field examiners, and field attorneys, to decide what charges to investigate and what complaints to issue. He also has the duty to prosecute such complaints before the NLRB.

Although all of the effects of making the General Counsel independent and supreme in prosecuting complaint cases are not clear, at least two of them are.

In the first place, the General Counsel, sole possessor of a power that formerly rested in the hands of three men, is—despite the efforts of Congress to avoid "multiple impersonation"—vested with functions which, although analytically distinguishable from functions of adjudication, have some of the practical impact of such functions.

Under the Wagner Act if a regional director refused to issue a complaint, the charging-party could appeal to the Board. When the Board sustained or overruled the regional director, it performed a function not unlike that performed by a judge in sustaining or overruling a demurrer. If the Board overruled the regional director's refusal, it ordered a complaint issued and a prosecution initiated. Under the Taft-Hartley Act the General Counsel has the job of reviewing the action of the regional director in complaint cases. Since the General Counsel, who is primarily a prosecuting officer, also rules on the issuance of complaints, he is—insofar as ruling on a complaint is analogous to ruling on a demurrer—both a judge and a prosecutor.

Actually, of course, the decision of the General Counsel on the issuance of a complaint is more closely analogous to the determination of a criminal prosecutor in deciding to go ahead or not to go ahead on an indictment than it is to a judicial decision on a demurrer. The General Counsel, like the prosecutor, is in the business of enforcing public, not private, rights. Yet the practical effect on the complainant who thinks he has a case but is turned down by the

General Counsel is not unlike the effect on the plaintiff against whom a judge sustains a demurrer.

The point is twofold. In the first place, the distinction between the judicial function of ruling on a demurrer and the administrative function of simply refusing to proceed becomes somewhat obscure when the two actions are viewed in the light of their practical effect on particular parties. In the second place, while some discretionary power to decide when complaints should issue must be given to the administrators of a public law statute, the significance of those decisions to private parties—particularly because of their finality—should not be overlooked. It has been rather commonplace to talk about Title I of the Taft-Hartley Act as if it conferred private rights: "It gives employers equal status under the law; it emancipates employees from the tyranny of union bosses; it imposes upon unions and union leaders new responsibilities to their members and to employers." While this kind of talk is technically unsound, it is not unimportant to look at the statute from this point of view.

No unfair labor practice set out in Title I of the Taft-Hartley Act is worth anything to particular employers, unions, or employees if the General Counsel refuses to issue a complaint. It is at least doubtful that private parties are less subject to "government by men" and more subject to "government by law" under the present structural arrangement of the NLRB than they were under the Wagner Act. The doubt arises for two reasons. First, the General Counsel is primarily a prosecutor. And prosecutors are more likely to be concerned with their batting averages (convictions divided by prosecutions) than they are with effectuating public policies or extending justice to private parties. This is not true of an administrative tribunal. Second, one administrator now has final authority to decide whether a particular person has something meaningful under a statute (in the sense that he can get some action taken to make it meaningful) whereas three administrators formerly had such authority. One of the real differences between a ruling on a regional director's refusal to issue a complaint and a trial judge's ruling on a demurrer is that, while the former ruling is terminal (because it is not a "final order" subject to judicial review), the trial judge's is not. The losing party on a demurrer can, unlike the turned-down charging-party, appeal the ruling to a review court. Under the Wagner Act the charging-party got a review from three men whose primary duties were adjudicative. Under the Taft-Hartley Act he gets a

review from one man whose primary job is prosecution. (See the structural charts on pages 6 and 7 for lines of authority and division of functions. Also compare the two charts in terms of bureaucratic complexity.)

A case in point illustrating the definitive authority of the General Cousel is *Times Square Store Corporation,* 22 LRRM 1373, handed down by the Board in September, 1948. The central issue of the case was whether or not the striking members of a union were eligible to vote in a representation election. They were entitled to vote if they were eligible for reinstatement to their jobs at the termination of the strike. Since the employer had filled their positions with permanent replacements during the course of the strike, they were eligible to reinstatement and hence eligible to vote if—by terms of previous Board rulings—they were "unfair labor practice" strikers—that is, they had struck because of some unfair labor practice committed by the employer. They were not eligible to reinstatement and hence not eligible to vote if they were "economic strikers"—that is, had struck for some reason other than the fact that the employer had committed an unfair labor practice, e.g., for higher wages, shorter hours, or better working conditions. The striking union insisted that the employer had committed an unfair labor practice and filed charges with the appropriate regional director. The regional director refused to issue a complaint, and the General Counsel foreclosed any further consideration of the matter by sustaining the regional director's decision. The National Labor Relations Board itself, in ruling on the eligibility of the strikers to vote, felt compelled by the General Counsel's decision to rule that the strike was purely economic and that the strikers could not vote. In short, the ruling by the General Counsel on the unfair labor practice point was final and conclusive and resulted in disenfranchisement of the strikers—the further result being that the striking union was defeated in the election and lost its status as the bargaining representative.

The second, and more important, result of giving the General Counsel final authority over the issuance of complaints is the fact that it lays the groundwork for serious policy conflicts.

It seems clear that, if Title I of the Taft-Hartley Act is to be well administered, the policies of the Board and the General Counsel must be uniform. The NLRB, which has final authority over representation and union shop cases, should not rule that a labor dispute

in industry X does not affect commerce and therefore that it will not resolve a representation question arising in that industry, while the General Counsel rules that a labor dispute in industry X does affect commerce and therefore that he will issue a complaint based on an unfair labor practice allegedly committed in that industry. Such a split in policy would result in all kinds of inequities and anomalies, produce inefficiencies because of the prosecution of the cases which the Board will ultimately dismiss on jurisdictional grounds, and create confusion and uncertainty as to coverage among unions and employers.

Conflicts of this type would be most unfortunate. Yet there is nothing in the Taft-Hartley law to prevent them. And they have arisen over the jurisdictional question with consequent confusion among employers and unions as to who is covered in what kinds of cases. According to General Counsel Robert N. Denham, the structural arrangement "can work successfully only so long as the Board and the General Counsel want it to work." It is strange that a Congress which wanted so badly to protect private persons from the caprice of administrators—to return to a "government by law rather than by men"—made the success or failure of the law to a large degree contingent upon the ability of two independent administrators to agree.

The inability of the Board and the General Counsel to see eye to eye has caused serious embarrassment. The General Counsel ruled in *North Virginia Broadcasters, Inc.*, 75 NLRB 11 (1947), that the American Federation of Labor and the Congress of Industrial Organizations are labor organizations and that no union affiliated with either one can successfully charge an unfair labor practice unless each A.F.L. or C.I.O. officer (the President, the Secretary-Treasurer, and the Vice-Presidents) has signed and submitted a non-Communist affidavit. The Board, on the other hand, ruled that neither the A.F.L. nor the C.I.O. is a labor organization for this purpose and that a local union affiliated with either one can successfully petition for certification if its officers and the officers of the union of which it is a constituent unit have satisfied the affidavit requirement, even though no C.I.O. or A.F.L. officer has done so.

The General Counsel indicated that he considered himself reversed and would adhere to the Board's ruling. But he didn't have to, and there is no statutory guaranty that he will continue to do so.

Moreover, since rulings on these preliminary matters are not

final orders, no direct appeal to a court lies. Not only is the refusal to issue a complaint immune from collateral court attack, but the issuance of a complaint and the initiation of proceedings is similarly immune—even though the petitioner alleges that the NLRB has no jurisdiction over him. See *Myers v. Bethlehem Shipbuilding Corporation,* 303 U.S. 41 (1938).

One who is interested in the success of the Taft-Hartley Act must hope that at least three of the five Board members and the General Counsel either operate in decisional unison or successfully negotiate away their differences. On this tissue rests a good deal of the hope for uniform administration of federal labor policy.

RULES OF EVIDENCE

ADHERENCE "SO FAR AS PRACTICABLE"

A second criticism of the Board under the Wagner Act was its failure to adhere strictly to the rules of evidence. In taking this position, the NLRB was following Section 10 (b) which declared that "the rules of evidence prevailing in courts of law or equity shall not be controlling."

These rules of evidence, e.g., the hearsay rule, were worked out to protect an inexpert fact-finding body without experience or training—a jury—from its own inexpertness, the basic notion being that, since jurors don't have enough skill to screen and sift evidence themselves, the courts ought to do it for them. An example of the hearsay rule follows: In a motor vehicle collision case Lawyer Thorne attempts to prove that Wells was riding in his client's car at the time of the accident. He offers as evidence Dr. Saner's testimony that Wells was in the car. But Dr. Saner did not witness the accident; he can only relate what Wells told him. This is hearsay and should be excluded as evidence because it is the declaration of a person not under oath; it is the declaration of a person not subject to cross-examination; Dr. Saner's testimony is offered to prove the truth of Wells' declaration. (Illustration taken from Maguire, *Heresy about Hearsay,* 8 University of Chicago Law Review, 621, 626 (1941).)

Since the NLRB is presumably composed of expert fact-finders with experience and training, serving not a short term, but performing a full-time job, the drafters of the Wagner Act thought it wise to free the Board from "the compulsion of technical rules so that the mere admission of matter which would be deemed incompe-

tent in judicial proceedings would not invalidate the administrative order." They reasoned that giving Board members and their agents the freedom to weigh and screen evidence ought to give litigants at least as much due process as the application of rules whose groundwork was laid before the administrative process was conceived. Moreover, they set up a court review to protect defendants against Board abuses. A court would not hold that findings of fact were supported by "substantial evidence" if they were based upon mere uncorroborated hearsay or rumor.

Nevertheless, under Section 10 (b) of the Taft-Hartley Act the NLRB must follow the rules of evidence applicable in federal district courts "so far as practicable." Precisely what this phrase means is not clear. It is one of the examples of nebulous language employed in the statute, the full implications of which will not be understood until there has been considerable litigation.

From the point of view of the advocate of administrative law, rigid adherence to the rules of evidence is never practicable. Actually, however, it is difficult to think of a situation in which the Board cannot follow the rules if it wishes to. Until there is extensive litigation determining what "so far as practicable" means, the Board and the trial examiners have the task of ruling on the admission of evidence without clear notions of what the rules are. And if their guess doesn't dovetail with the review court's ruling, they may commit reversible error. The importance of the provision cannot, however, be judged in terms of its immediate effect on the conduct of Board hearings. Its significance lies in the fact that it gives review courts a new ground for refusing to enforce Board orders.

Apparently the inclusion of the phrase in the statute at all is the result of some sort of compromise between those legislators who think that the administrative process in general and the NLRB in particular represent a dangerous departure from Anglo-American traditions and those legislators who think that some latitude in hearing procedure is desirable in the public law areas. The result is a rule not highly offensive to either side because neither understands it. It is interesting to compare this provision on evidence with Section 7 (c) of the Administrative Procedure Act of 1946. That statute provides that "*Any* oral or documentary evidence *may* be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . ."

FREEDOM OF SPEECH

From 1935 to 1947 the National Labor Relations Board, adopting the view that an employee is peculiarly sensitive to the wishes of his employer, took the position that an employer's remarks, which might not be coercive in another context, might well be coercive when blended with a history of antiunionism. Thus, if an employer said to a business acquaintance, "We don't want any union in our plant," the statement would be privileged. But if he made the same remark to one of his employees who was about to vote on whether or not he wanted a union as his collective bargaining representative —and the employee knew that the employer had previously fired three workers for union activity, had operated an espionage system, and had bragged about his success in breaking strikes—the Board would conclude that the employer had committed the unfair labor practice of interfering with his employee's freedom to select a collective bargaining representative of his own choice.

The Board's approach to this problem was realistic, liability resting upon the effect that the employer's conduct and words had on the employee in restraining his freedom of choice. And if it appeared that the employee had been intimidated, even though the remarks themselves had contained no threats, the employer was adjudged guilty. As one appellate court put it, "To establish interference, restraint or coercion of employees by the employer, it is not necessary that there be direct testimony that threats were made or even persistent entreaty or persuasion brought to bear upon the minds of the employees. It is sufficient if from all the surrounding circumstances it appears that the employer has exercised such influence over his employees as to subject their will to his to such an extent that their minds are overcome and confused, without convincing their judgment." *Owens-Illinois Glass Co. v. NLRB,* 123 F. 2nd 670 (C.C.A. 6th, 1941).

Pursuant to a desire to protect "freedom of speech," Congress included in the Taft-Hartley Act Section 8 (c), which, if given a literal twist, establishes one of the broadest exclusionary rules of evidence extant in either the judicial or administrative processes. It provides that the expression and dissemination of an opinion (whether made by an employer, a union, or any other person) shall not "constitute or be evidence of" an unfair labor practice, unless it contains a threat of reprisal, a threat of force, or a promise of benefit.

As indicated above, under the Wagner Act conduct, though evidenced in part by speech, could amount, in connection with other circumstances, to coercion within the meaning of the act. If the total activities of an employer restrained or coerced his employees in their free choice, then those employees were entitled to protection. And in determining whether a course of conduct amounted to restraint or coercion, pressure exerted vocally by the employer was no more disregarded than pressure exerted in other ways. The Senate bill's version of Section 8 (c) stated than an unfair labor practice was not to be based on a statement of views or arguments if it contained *under all the circumstances* no threat, *express or implied,* of reprisal or force, or offer, *express or implied,* of benefit. Deletion of "under all the circumstances" and "express or implied" from the final form of Section 8 (c) casts real doubt on the vitality of the "totality of conduct" doctrine which obtained under the Wagner Act.

Moreover, Section 8 (c) appears to preclude the NLRB from considering as evidence of an unfair labor practice remarks which are not coercive, although apparently the Board can consider remarks which are not coercive as evidence of no unfair labor practice.

Strictly construed, then, this provision means that the Board cannot consider as evidence of an unfair labor practice an employer's statements *in re* unionism made to his employees (or a union organizer's statements *in re* the employer or the desirability of joining a union) unless they are unfair labor practices on their face. Accordingly, the NLRB is constrained to reach different conclusions in examples like the one mentioned above.

"We don't want any union in our plant" is noncoercive on its face, i.e., it contains no threat or promise. Therefore, it can no longer "be evidence" supporting the finding of an unfair labor practice, nor can the Board infer threats or promises from such a statement by viewing it in the light of an antiunion context. (This is similar to saying to a jury, which is considering whether or not a husband's marriage promise was exacted under duress, that while it may consider the fact that the girl's father had an axe in his right hand, it may not consider the fact that he said, "If I were you, I'd marry this girl.")

Moreover, this provision, although it was passed primarily to protect employers' freedom of speech, affords an immunity to unions. Under Section 8 (b) (1) it is an unfair labor practice for a labor organization or its agents to coerce an employee in the exercise of

his rights to engage in, or to refrain from engaging in, union activities. But what shall the NLRB do with the statement of a union organizer to a nonunion employee who knew that two other nonunion workers had been assaulted in the alley the previous night, "I think you will enjoy your job more if you join up."? Such a remark contains no threats or promises. Is it to be considered as "coercive" *under all the circumstances?* Or is it to be excluded as inadmissible evidence—or, at least, disregarded as part of the evidence upon which a final order can be based?

It is important to emphasize that Section 8 (c), strictly construed, does more than tell the NLRB that it must cease presuming that an employer's remarks about unions are more effective when made to his employees than when made to his golfing partners, and that it must not presume that a union organizer's remarks about the healthiness of joining a union are more effective when made to a nonunion man in a strongly organized area than when made to his bowling partners. It tells the Board that in reaching its conclusions it cannot consider such remarks at all. Thus, expert fact-finders are shackled by a rule harsher than any imposed on inexpert fact-finders. A jury in cases turning around the issue of duress can consider such statements; the NLRB in cases turning around the issue of coercion apparently cannot.

The necessity for promulgating such a board rule is not as clear as the freedom of speech rationale suggests. The NLRB in the first six years of its existence undoubtedly went too far in some cases in imposing penalties for employer statements. For example, in the *Diamond T Motor Co. v. NLRB,* 119 F. 2nd 978 (C.C.A. 7th., 1941), the Board held that an employer without an antiunion history who said in effect to his employees, "Form any organization you wish but whether it be independent, A.F. of L., or C.I.O., I prefer that you give me someone to deal with who is working in our plant and knows our business problems rather than someone who is an outsider," had committed an unfair labor practice. The court denied enforcement. But the Board's record in later years was not generally subject to attack on the grounds that it abridged freedom of speech.

A pre-election letter sent to all employees announcing, among other things, that "... every employee shall be protected in his right to work here irrespective of membership or nonmembership in any labor organization" and that "No employee or group of employees can or will receive any advantage whatsoever over any other group

because of membership in any organization" was held not to constitute an unfair labor practice. A similar result was reached in a case in which the employer, in arguing against endorsement of a C.I.O. union, stated that the issue was his program of expansion and reconversion versus the C.I.O. program of strikes, idle plants, jobless men, and empty dinner pails, admonished his employees to "face the facts," and closed by remarking that the company would abide by the employees' decision at the election.

Paul Herzog, Chairman of the National Labor Relations Board, has expressed his belief that Section 8 (c) produces little change in determining what constitutes an unfair labor practice. During the last two years of the Wagner Act the Board, as indicated above, tended to limit its holdings that employer statements themselves were unfair labor practices to those situations in which the statements were either coercive on their face or uttered under coercive circumstances.

But he acknowledges the problems raised by the provision insofar as it says that noncoercive statements cannot be used as evidence. "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." And if, in determining whether or not a course of conduct amounts to restraint or coercion, the Board must disregard all vocal pressures which are noncoercive on their face, the protection extended to employees under the Wagner Act is greatly reduced.

Moreover, as Herzog points out, the rule has an impact on the meaning of unfair labor practices other than the one proscribing interference with employee rights. For example, what does the NLRB now do with a case involving the allegedly discriminatory discharge of an employee where part of the motive is evidenced by a simultaneous, but noncoercive, antiunion statement made by the foreman who did the discharging?

The determinative factor in deciding whether or not a discharge was discriminatory—that is, effected in order to encourage or discourage union membership—is motive. The Board cannot order reinstatement of an individual who was discharged for cause. See Section 10 (c). Expressions of opinion often help to indicate motive. Yet Section 8 (c) says that the expression of views or opinions shall not be evidence of an unfair labor practice, if such expression contains no threat of reprisal or force or promise of benefit.

When asked by Senator Pepper if, in a case in which a man was fired on Thursday and the question was whether he was fired for cause or for union activity, the employer's statement on Monday that he hated labor unions and thought they were a menace to the country would be admissible in evidence as bearing on motive, Senator Taft replied: "It would depend upon the facts. Under the facts generally stated by the Senator, I think that statement would not be evidence of any threat. There would have to be some other circumstance to tie in with the act of the employer. If the act of discharging is illegal and an unfair labor practice, consideration of such a statement would be proper. But it would not be proper to consider as evidence in such a case a speech which in itself contained no threat express or implied." 93 Cong. Rec. 6603-04 (June 5, 1947).

Because of Section 8 (c) it is clear that the employee's rights are not protected from employer interference under the Taft-Hartley Act in the way that they were under the Wagner Act, and that they are not protected from union interference in the way that they would have been if such a rule had not been promulgated. Not only is proof of unfair labor practices more difficult than heretofore, but review courts have, as in the case of adherence to the rules of evidence "so far as practicable," additional grounds for refusal to enforce. In these facts lies the real significance of Section 8 (c).

SUBPOENA POWERS

Under the Wagner Act the Board refused to subpoena a witness as requested by a party if the request was not timely or did not state the facts which the witness was to prove, or if the facts if proved would be irrelevant or mere duplication. In short, the Board, as is the usual case with administrative agencies, reserved the discretionary authority to refuse to issue subpoenas. This reservation of discretionary authority was based on Section 11 (1) of the statute: "Any member of the Board *shall have power* to issue subpoenas. . . ."

This was another focal point of attack against the NLRB, and the Taft-Hartley Act answered the attackers by limiting the Board's discretion in subpoena matters. It reads: "The Board . . . *shall* upon application of any party to such proceedings, forthwith *issue* to such party subpoenas requiring the attendance and testimony of witnesses. . . . Within five days after the service of a subpoena on any person . . . such person may petition the Board to revoke, and the Board shall revoke, such subpoena, if in its opinion the evidence

whose production is required does not relate to any matter under investigation, or any matter in question . . . or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required."

In short, the Board now has no authority, discretionary or otherwise, to refuse to issue a subpoena. It has authority to revoke it if (1) the party upon whom the subpoena is served so requests within five days after service, *and* (2) the evidence is irrelevant or not described with sufficient particularity. Irrelevancy and lack of particularity are grounds for revocation only if the party served requests such revocation. Duplication is not grounds for denial or revocation in any case.

For example, suppose in an unfair labor practice case the issue of whether or not the union represents a majority of employees arises. In order to prove its majority status, the union offers in evidence 500 authorization cards signed individually by the employees. The employer refuses to examine the cards or to compare the signatures on them with the signatures on his pay roll, but instead requests that the Board subpoena each of the 500 employees to testify whether or not he wants the union as his collective bargaining representative.

Since the testimony of the 500 employees would be mere duplication of evidence already in the record and since the employer's obvious purpose was to delay the proceedings, the Board in an actual case under the Wagner Act involving this point refused to issue subpoenas. See *NLRB v. Blackstone Mfg. Co.,* 123 F. 2nd 633 (C.C.A. 2nd, 1941). Under the Taft-Hartley Act the Board in such a case must issue the subpoenas. It has no grounds either for denial or revocation.

SPLITTING OF FUNCTIONS

Another defect in the NLRB procedure was said to be the separation of the responsibility to hear from that of determining. As pointed out above, under the Wagner Act a trial examiner heard the case, but the Board itself, after receiving his findings and recommendations (and reading briefs and listening to oral argument, if any), determined whether or not the defendant was guilty. Moreover, the Board's practice was not to read the record personally, but to refer it to a review attorney for analysis. Subsequently the review attorney submitted a report to the Board, and it relied heavily on this report in deciding the case.

The Board employed this method because of its large volume of work. The review attorneys performed functions comparable to those performed by the clerks who serve as assistants to United States Supreme Court justices. The procedure itself was no more objectionable than the practice of some appellate courts of assigning to one judge the job of reading the record and writing the decision, the other judges seeing the detail of the decision for the first time after it is drafted.

Both of these alleged defects are removed by the Taft-Hartley Act. Under Section 10 (c) the findings, conclusions, and recommendations of trial examiners now become effective as official Board orders without being reviewed by the Board itself, unless one of the parties files exceptions to the trial examiner's report within twenty days after it is served.

This alteration in effect establishes a kind of trial court-appellate court relationship between the Board and its trial examiners, the filing of exceptions being analogous to an appeal. The chief difference is that, arguably, an aggrieved party can, if he has urged his objections before the trial examiner, elect to by-pass the immediate appellate tribunal—in this case, the Board—and appeal directly to a circuit court of appeals. This change may, then, have the effect of decreasing the Board's authority over its trial examiners while at the same time holding its responsibility for their actions constant. To put this another way, if the aggrieved party appeals directly to a court, the court may reverse the Board's order for error, although the error was made by the trial examiner, not the Board, and the Board had no opportunity to review the trial examiner's work.

Section 8 (a) of the Administrative Procedure Act of 1946 provides:

> Whenever such [hearing] officers make the initial decision and in the absence of either an appeal to the agency or *review upon motion of the agency* within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.

Apparently the NLRB is singled out for special treatment. It has no power to call a case up for review on its own motion. It has the power to review only if the parties desire it.

Circumventing the NLRB may be precluded by application of the doctrine that administrative remedies must be exhausted before seeking judicial relief, although it is possible that even then appellants will be able to get court review of matters affecting the Board's power to act, e.g., the question of jurisdiction.

The Board itself has, in an apparent effort to discourage such attempts, provided in Sections 203.46 (b) and 203.48, respectively, of its Rules and Regulations that "No matter not included in a statement of exceptions may thereafter be urged before the Board, *or in any further proceedings*" and that "In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes." The effectiveness of these provisions remains to be seen.

The Taft-Hartley Act abolishes the review division and attempts to place more of the responsibility for decisions on Board members themselves. Under the terms of Section 4 (a) no person, other than a Board member or his legal assistant, can review transcripts of hearings, prepare drafts of opinions, or review a trial examiner's report.

But there is nothing in the statute which prevents each NLRB member from having as many legal assistants as the budget permits. As a consequence, there are now approximately sixty-five legal assistants employed by the Board, each member having from ten to fifteen of them working for him. One wonders whether the Taft-Hartley Act has simply caused the creation of five review divisions instead of one.

SCOPE OF COURT REVIEW

A final source of complaint against the NLRB under the Wagner Act was the alleged inadequacy of court review. Under Section 10 (c) of the Wagner Act the Board's decision had to be based "upon all of the testimony taken." And review courts were told by Section 10 (e): "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Pursuant to this statutory limitation, courts reviewing Board proceedings held that, if there was enough relevant evidence in the record so that a reasonable man could accept

it as adequate to support the conclusions reached, the findings of fact were conclusive.

There is general agreement among writers, commentators, and judges that the Taft-Hartley Act widens the scope of court review, but no one is certain of the extent. Section 10 (c) reads that the Board's decision must be based upon "the preponderance of the testimony taken." Section 10 (e) states that review courts shall consider the "findings of the Board with respect to questions of fact if supported by *substantial evidence on the record considered as a whole* . . . conclusive."

According to Senator Wayne Morse, a member of the Senate Committee on Labor and Public Welfare, who suggested the phrase in Section 10 (e), the words are intended to make no change in the rule governing the scope of court review over matters of fact. The phrase means, he pointed out, substantially the same thing as the one contained in the Administrative Procedure Act. The circuit courts have thus far agreed with him.

There remains, however, the significance of the phrase in Section 10 (c) that the NLRB's decision must rest upon "the preponderance of the testimony taken." It has been argued that this phrase is merely a direction or guide to the Board and that it has no effect on the scope of court review. Yet the courts are empowered to decide whether or not the Board has exceeded its statutory authority. Thus it can be argued that even though the finding of fact is based on substantial evidence, if the conclusion is not supported by a preponderance of testimony, the Board has exceeded its authority and its order should not be enforced.

The two most troublesome kinds of cases on judicial review are those which involve an issue of the credibility of the witnesses and those which involve the drawing of inferences from the evidence in the record.

For an example of the first type, take a case where a department store is charged by the NLRB with having committed an unfair labor practice—namely, discharging an elevator operator because of her union activities. The elevator operator testifies that she was a union organizer, that the supervisor of elevator operators made anti-union remarks to her, that the supervisor of elevator operators told her she would be discharged if she didn't cease her union activities, and that she had been an exemplary employee, on the job for sixteen years without reprimand. The supervisor testifies that she made

no antiunion remarks to the operator and that she did not threaten discharge for union activities, that the operator was insubordinate, that she repeatedly violated store rules, that she was disobedient, and that she was discharged not because of union activities but because of her insubordination and repeated disobedience.

What should be the Board's decision in such a case? Under the Wagner Act the Board was the sole judge of the credibility of the witnesses and the relative weights which should be attached to their testimony. In an actual case involving the conflicting testimony outlined above, the Board found as a matter of fact that the supervisor had made antiunion remarks and threats and concluded that the department store had discharged the operator because of her union activity, the effect being to discourage such activity. The store was accordingly adjudged guilty of an unfair labor practice and ordered to cease and desist and to reinstate the employee with back pay. Since there was enough relevant evidence in the record to support the conclusion, the circuit court of appeals on review sustained the Board's action. See *NLRB v. May Dept. Stores Co.*, d.b.a. *Famous-Barr Co.*, 162 F. 2nd 247 (C.C.A. 8th, 1947).

Under the Taft-Hartley Act the court might take a contrary position in such a case, deciding that the Board had exceeded its statutory authority because in the court's opinion, although the Board's finding of fact was based on substantial evidence, its conclusion was not supported by a preponderance of testimony taken. The court in taking such a position would, of course, be second-guessing the Board on the matter of which witness was more reliable and whose testimony more credible. Further doubt as to the court's determination in such a case under the Taft-Hartley Act would be instilled by the fact that it involved not only an issue of credibility but also the drawing of an inference as to motive. Having accepted the elevator operator's testimony as fact, the Board proceeded to infer from that testimony that she had been discharged with antiunionism as the motive. Could the Board properly draw such an inference, which clearly did not rest on a "preponderance of testimony taken"?

For an example of the second type of case, take *NLRB v. Arcade Sunshine Co.*, 118 F. 2nd 49 (C.A. for D.C., 1940; certiorari denied 313 U.S. 567) in which the company was charged with discharging in 1937 an employee named Jones because he was active in a union (a discriminatory discharge, if true).

The company defended itself on the grounds that the motive for discharge was the worker's drunkenness. The president and the foreman testified that the employee was habitually drunk (Jones admitted that he "always did drink"), that he had been discharged in 1934 and reinstated a few days later, that on the day in 1937 when Jones was discharged he was intoxicated and could not do his work (the Board found this to be a fact), that he had been drunk practically every day for ten years, that his usual output was 10 or 12 per cent of a fair day's work, that the president had called to the foreman's attention the alcohol on Jones' breath four or five times a week for ten years, that the president each year (sometimes three times a day) had told the foreman to discharge Jones.

The Board attorney introduced the following evidence to show that the motive for the discharge was to discourage union membership: Jones began work for the company in 1926; he joined the union in May, 1937; he attended meetings, distributed union circulars, and talked about the union; in June or July of 1937 the foreman and the president asked Jones about his union membership, and when he denied having attended a certain union meeting, the president said, "You can't fool me; I know"; shortly thereafter he was asked by the cashier, in the presence of the vice-president, to sign a "loyalty" petition; he refused; a few weeks later he was discharged; when he asked the president to reinstate him, he was told, "You talk too much around here; you walk around and talk about the union."

The Board found that the testimony of the foreman and of the president showed "an obvious effort to construct a case against Jones and to cover up the real reason for his discharge." The Board concluded that the discharge was discriminatory.

The review court sustained the Board because (1) it is for the Board, not a court, to weigh conflicting testimony and pass on credibility, and (2) although a reasonable man might have concluded that Jones was discharged solely for intoxication, he might have decided as the Board did (because there was "sufficient relevant evidence as a reasonable mind might accept as adequate to support the conclusion").

Under the Taft-Hartley Act presumably such statements as the president and the foreman made are not admissible as evidence of motive because of the "freedom of speech" rule. And because decisions must now be based upon a "preponderance of testimony," it seems reasonable to expect the Board to reach different conclusions

in such cases. If it does not, it can be persuasively argued that a review court should refuse to enforce an order based on such a conclusion.

It is certainly to be hoped that the early court decisions supporting the thesis that the scope of review under the Taft-Hartley Act is only "immaterially changed from the scope of . . . review under the [original] National Labor Relations Act" presage accurately the rule which will evolve.

Decisions as to the credibility of witnesses are much better left in the hands of the tribunal that hears those witnesses rather than in the hands of an appellate court passing judgment solely on the basis of argument and record. The power to draw inferences from the facts in the record as to such matters as motive or state of mind should also properly rest in the Board. Jurors and judges draw such inferences frequently—and necessarily—and unless they are "against the manifest weight of the evidence," they are not usually overturned. Since one of the chief reasons for having an administrative tribunal sit in judgment in specialized areas is to take advantage of the expertness which it develops, it seems entirely proper to permit its conclusions to stand unless they are unreasonable—that is, such findings as a reasonable man could not have reached from the same evidence.

One may sum up the over-all effect of these five major procedural changes effected by the Taft-Hartley Act by saying that they reflect the "Theology of Nonenforcement," a phrase used by Thurman Arnold in another context. And it is rather peculiar that the legislators who drafted and supported the 1947 statute expressed such a philosophy. First they announced their intention to free employees from the tyranny of unions and to give employers equal rights with unions. Then they arranged to impede the operation of the administrative agency which is supposed to achieve the emancipation and to make the new statutory rights of employers meaningful.

CHAPTER II

Jurisdiction

COMMERCE

THE NATIONAL LABOR RELATIONS BOARD takes jurisdiction only over industries or activities which "affect commerce," which means primarily matters in interstate commerce, or burdening or obstructing interstate commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce.

Under the Wagner Act the general test of jurisdiction was: Will a stoppage of operations because of industrial strife result in a substantial interruption to, or burden upon, interstate or foreign commerce?

Groups previously found by the Board—operating under the Wagner Act—to be in or to "affect" commerce included:

1. The instrumentalities of interstate commerce, e.g., maritime shipping, motorbus transportation, the collection and transmission of news, and public utility companies which either actually serve across state lines or serve within the state an instrumentality of interstate commerce. (For examples, a public utility which sold electricity wholly intrastate, a small percentage of which went to railroads and telephone companies which were themselves engaged in interstate commerce, was held to "affect commerce"; a local telephone company which transmitted interstate messages over lines wholly intrastate, but connected a small number of its lines to an interstate telephone company was held to "affect commerce.")

2. Employers who import or export materials or products in interstate commerce, whether directly or through local agents. (For example, a New Jersey processor of materials for women's garments who got his materials from a New York firm and returned them to the New Jersey representative of the New York firm, who then shipped them out of state—the New York company keeping title to the goods at all times.)

3. Firms which get practically all of their raw materials intrastate but ship a substantial number of their products out of state, e.g., mining, lumbering, and fruit-packing. (For example, a fruit-

packing company which bought its raw materials within the state, and shipped 37 per cent of its finished products to out-of-state purchasers, deliveries being made F.O.B. at points within the state.)

4. Businesses which import large quantities of materials from out of state, but export virtually nothing outside the state, e.g., a large department store, a chain store, and a large baking company.

Under the Wagner Act the Board also took jurisdiction over insurance companies, large banks, news distributing services like the Associated Press, radio stations, a laundry and dry-cleaning establishment located on a state line, and a private mail contractor who transported mail to and from a United States Post Office but delivered and picked up wholly within the state.

There was no hard and fast formula for determining what percentage of raw materials or finished products had to be either purchased from, or sent into, interstate markets in order to bring the activity within the purview of the Wagner Act. The fact that an employer purchased 2 to 5 per cent of his raw materials, and shipped 10 to 20 per cent of his finished products, in interstate commerce was sufficient to establish jurisdiction in one case. But the fact that a manufacturer who bought most of his supplies intrastate shipped .3 of 1 per cent of his products in interstate commerce was insufficient in another.

The fact that the employer's total output was an insignificant part of national output was not necessarily sufficient to remove the interstate character of his business. For example, a manufacturer of men's clothing who bought 99 per cent of his raw materials, and sold 82 per cent of his finished products, out of state, but whose total output was less than .5 of 1 per cent of all men's clothing produced in the United States, was held to be within the jurisdiction of the Wagner Act.

Except for the instrumentalities of commerce (where somewhat different criteria were applied) , one can say that the test was: Is a substantial part of the employer's output designed for export out of state (either by the employer or his vendee) , or is a substantial part of the raw material he uses imported from out of state (either by the employer or his vendor) ? If the answer to either one of these questions was yes, the NLRB could safely assert jurisdiction. It is interesting to note that the Board had a perfect record before the United States Supreme Court in such matters.

Since the Taft-Hartley Act does not alter any of the language of the Wagner Act relating to matters of jurisdiction, there is no statutory basis for asserting that the jurisdiction of the Board has been affected one way or another. The general rules set out above still stand.

In the past the NLRB has generally refused to take jurisdiction over matters arising in certain industries (e.g., the building trades and local automobile distributors), although a review court probably would have sustained the Board's assumption of jurisdiction. The Board is continuing this general policy under the 1947 statute.

For example, it has held that although a bakery which purchases 70 per cent of its supplies from outside the state "affects" commerce, taking jurisdiction would not "effectuate the policies of the act."

However, specific changes in the general policy have been made. The Board has taken jurisdiction over the building and construction industry (although not over some types of retail lumber yards) and has processed cases involving automobile sales and service agencies.

It seems fair to say that the Board, and particularly the General Counsel, are more disposed now to assert jurisdiction over borderline cases than was the situation under the Wagner Act. Indeed, at times it has appeared that the General Counsel's policy is to establish the outer limits of jurisdiction by asserting authority over almost everything and letting the Board and the courts mark out the boundaries. But the general test of jurisdiction remains the same, namely, will a work stoppage because of a labor dispute substantially interrupt or burden interstate commerce?

Some specific activities which have fallen within the Board's purview during the past year are: a retail dry goods store which imported substantial supplies from out of state but sold all its goods intrastate; an integrated transit system which, while located entirely intrastate, serviced large plants and railroad stations and bought its fuel from out of state; a bank and its wholly owned safety deposit company; the branch office of a national insurance company; and a radio station.

Under Section 10 (a) of the Taft-Hartley Act the Board is specifically empowered to cede jurisdiction—in cases which "affect commerce"—to state labor relations boards which will apply to the ceded cases rules and policies consistent with the federal act. The only limitations on this power are mining, manufacturing, communications, and transportation activities which are not predominantly

local. Since the state labor relations acts are not patterned after the NLRA as amended by the Taft-Hartley Act (for example, no state statute carries non-Communist affidavit provisions), and since apparently the general policy is to extend federal authority, the NLRB cannot be expected to establish many working agreements with state boards. As of September 1, 1948, it had established one—with the Wisconsin Employment Relations Board—an agreement which relates only to the conduct of union shop elections in industries which affect interstate commerce and are located in Wisconsin. Inconclusive conferences have been held with officials of the New York, Massachusetts, and Pennsylvania Boards.

PERSONS

Section 2 (1) of the Taft-Hartley Act extends the jurisdiction of the National Labor Relations Board by including labor organizations within the meaning of the term "persons," but the net effect of the entire section is to narrow the scope of the statute's coverage relative to what it was under the Wagner Act.

Employer is defined to include any person "acting as an agent of an employer," instead of a person "acting in the interest of an employer"—as under the Wagner Act. This definition is aimed primarily at the old Board's policy of finding an employer guilty of an unfair labor practice upon proof that his supervisors had interfered with employees in the exercise of their right to engage in union activity, when the employer had specifically told the supervisors to refrain from such interference or discrimination but had not made his neutrality clear to his employees. The old policy was an application of the rule that an employer is responsible for coercion committed by his supervisory employees under circumstances which justify the employees' thinking that the supervisors are voicing the policy of the employer. The new rule is designed to make "employers responsible for what people say or do only when it is within the *actual* or *apparent* scope of their authority."

It is difficult to see any valid justification for this change. Realistically, the typical employee regards the supervisor immediately above him as the company. To him the words and acts of the foreman reflect the policies of the firm. No inequities were worked by application of the Wagner Act rule based on this realistic presumption. Employers who made their neutrality clear to their employees

were not found guilty of unfair labor practices because a few foremen engaged in illegal and unauthorized conduct. Even in cases where employers were found guilty because of coercion and interference committed by their supervisors, they were not penalized. At most they were ordered to cease and desist and post appropriate notices.

Although Congress clearly intended to narrow the area of employer responsibility with this change, it is very doubtful that this objective has been achieved—except insofar as Board attorneys have to *prove* that the employer has given the employees a reasonable basis for believing that their supervisors speak for the company instead of *presuming* it. First, as far as oral interference by supervisors with the employees' right to organize is concerned, they are generally "apparent" agents of the employer—that is, from the standpoint of the employees affected the supervisors are "apparently" speaking for the employer. Second, as far as acts of discrimination, e.g., discharge or layoff by supervisors, are concerned, they are usually not only "apparent" agents but also are typically "acting within the scope of their employment"—that is, they are performing acts incident to their primary job of directing the employees and are—partly, at least—serving the interests of their employer. Third, Section 2 (13) of the statute says that actual authorization or ratification *shall not control* in determining whether or not a person was an agent so as to make some other person responsible for his specific acts.

Totally exempt from the meaning of "employer" are the United States, wholly owned government corporations, Federal Reserve Banks, states or their political subdivisions, corporations or associations operating hospitals not for the profit of private persons, persons subject to the Railway Labor Act, and labor organizations, except when acting as employers.

The specific exclusion of independent contractors from the meaning of "employee" is another expression of the policy of limiting the coverage of the statute. This rule is aimed at the decision in the case of *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111 (1944), in which the United States Supreme Court sustained a decision of the Board holding that newsboys who sell newspapers full time at established spots are employees, even though they take the newspapers from the publisher on consignment and sell them to the public.

As a consequence of this change the Board has excluded newsboys who have control over the selection of their routes and their hours of work, with their income being the difference between what they pay the publisher for the newspapers and the price at which they sell them to the public. Similarly, agents operating rural telephone exchanges under contract with telephone companies have been held to be independent contractors.

The most widely publicized exclusion in Section 2 centers around supervisors and reads: "The term 'employee' . . . shall not include . . . any individual employed as a supervisor." A supervisor is a person who has authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority requires the use of independent judgment and is not a routine or clerical function.

In addition to the limitation of Section 2, Section 14 (a) deprives supervisors in industries affecting commerce of any of the statutory rights set up in Title I of the Taft-Hartley Act or in any other law, national or local, relating to collective bargaining.

Supervisors can, however, become and remain members of a union. But neither they nor their union has any rights under the law, nor is the union subject to the duties imposed by it. Supervisors can join such organizations as the Foremen's Association of America, but no employer has the legal duty to treat them as employees or to bargain with them collectively. This limitation of the statute is designed to, and does, change the rule of *Packard Motor Car Co. v. NLRB,* 675 Sup. 789 (1947), that foremen can constitute a unit appropriate for collective bargaining within the meaning of the National Labor Relations Act and that an employer has the legal duty to bargain collectively with the union which they select as their bargaining representative.

Also excluded from the meaning of "employee" are: agricultural laborers, domestic servants, persons employed by parent or spouse, persons working for employers subject to the Railway Labor Act, and persons working for any other person who is not defined as an employer by the statute.

CONDITIONS PRECEDENT

The National Labor Relations Board cannot assume jurisdiction over any matter raised by a union that has not complied with

three conditions precedent set out in Section 9 (f), (g), and (h) of the Taft-Hartley Act. To put it more specifically, a noncomplying labor organization cannot charge any person with an unfair labor practice, successfully petition for a bargaining election, be certified as a bargaining representative, or successfully petition for a union shop referendum.

Moreover, not only the local union, but the national or international labor organization of which it is an affiliate or constituent unit must have complied (neither the C.I.O. nor the A.F.L. is a labor organization for this purpose). For example, if a local of the United Automobile Workers raises a representation issue before the Board, the appropriate regional director will refuse to process it unless both the local U.A.W. union and the national U.A.W. have met the conditions.

REGISTRATION

The local union and the national or international of which it is an affiliate must file with the Secretary of Labor copies of their constitution and by-laws and a report showing (1) name and address, (2) the three principal officers and all officers who received more than $5,000 the previous year in salary and allowances, the procedure for choosing them, and the amount of their salary and allowances, (3) the amount of initiation fees and regular fees and dues, (4) the qualifications for membership, and (5) data relevant to elections, meetings, discipline, contract ratification, strike authorization, and other methods of operation. In addition, these reports must be kept up to date annually.

This provision of the law is a step in the right direction. But, like the section requiring financial reports (explained below), it is a short and inadequate step. In the first place, it does not vest any rights in union members. It gives them no guarantees. It simply provides for registration by unions if they desire rights before the NLRB. In the second place, the minority of unions which are undemocratically operated and are in greatest need of internal reform are, generally speaking, those which least need the protections of the Board and which have, therefore, the least reason to comply with the provision. In the third place, all a union has to do in order to meet the conditions of the law is to tell the Secretary of Labor how undemocratic it is. There is nothing in the statute that enables the government, employers, or employees to do anything about a union

which elects its officers for life or about officers who have the power to expel members arbitrarily.

FINANCIAL REPORTS

The local union and the national or international of which it is an affiliate must file with the Secretary of Labor a financial report showing (1) receipts and the sources thereof, (2) assets and liabilities at the end of the last fiscal year, (3) disbursements during the last fiscal year, and (4) the purposes for which such disbursements were made.

The union must keep these reports up to date and distribute them annually to its members "in the form and manner prescribed." A union can satisfy this requirement in any one of four ways: by putting a copy of the report either in a union newspaper or in a bulletin distributed in regular course to all members; by supplying to each unit of the local a sufficient number of copies for all members of such unit with instructions to post one copy on a bulletin board and to announce to the membership at a regular meeting that copies are available for distribution; by mailing copies to all members; by posting a copy in a conspicuous place at both the union headquarters and meeting place and announcing at a regular meeting that copies are available for distribution to all members.

NON-COMMUNIST AFFIDAVITS

By and large the American trade-union movement, unlike the labor movement in other countries, is committed to a free enterprise, capitalistic economy. There are exceptions to this generalization, but they operate in the fringe, albeit sometimes vital, areas. Collective bargaining is a device peculiarly well adapted to a capitalistic society. It is at once both an institution and a technique for resolving labor-management disputes without major alteration of any of the basic institutional arrangements of our society.

To the typical American trade-union leader effective collective bargaining is a primary objective. To the relatively few union leaders who are not only deeply class-conscious but also infected with the notion that sweeping and even violent institutional changes are necessary in order to obtain economic justice for the workers collective bargaining is a makeshift device for wresting maximum gains without regard for the impact of those gains on the fundamental framework of the economy. The Communist, since he is basically

committed to the destruction of the position of one party to the process, cannot accept collective bargaining as a goal.

Perhaps in part for this reason, but more clearly as a part of the pattern of resistance to the Soviet Union and growing concern, even nervousness, over the strength of some American Communists in the labor movement, the Eightieth Congress passed Section 9 (h) of the Taft-Hartley Act. This section requires each local union officer and each officer of the national or international of which it is an affiliate to submit an affidavit annually to the National Labor Relations Board showing that he is not a member of, or affiliated with, the Communist Party, or a member of, or believer in, or supporter of, any organization that teaches the overthrow of the United States Government by force or illegal methods.

If an officer falsifies the non-Communist affidavit, the union is not punished and presumably maintains its status before the NLRB. However, the officer is subject to criminal prosecution, the maximum penalties being a fine of $10,000, ten years imprisonment, or both.

If a union officer asserts in his affidavit that he is a member of the Communist Party, presumably the union loses its status before the NLRB until it replaces that officer with one who submits a proper affidavit. There is, however, no legal sanction applied against the officer who admits that he is a Communist, and although the union can expel him, it cannot cause his discharge on the ground that he is not a union member without committing an unfair labor practice—even though a lawful union shop agreement is in effect.

The affidavit requirement apparently is based on the assumption that Communist union officers will be forced out into the open, the result being, since the union is losing important statutory rights, that the membership votes them out of power. It is extraordinarily difficult to evaluate Section 9 (h) in light of this objective.

There is no doubt that Communists are losing influence in American unions, but there is considerable doubt that the Taft-Hartley Act has produced this development. The affidavit requirement sharpened the issue in the intraunion conflict in the United Automobile Workers (C.I.O.) in the summer and fall of 1947 and very likely contributed to the overwhelming victory of Walter Reuther. But by and large the loss of Communist power and prestige appears to be the result of the conservatism, pragmatism, and realism of the American trade-union movement.

There is serious constitutional law objection to the requirement of a non-Communist affidavit. The Fifth Amendment to the Constitution reads that no person should be "deprived of life, liberty, or property, without due process of law. . . ." A statutory right is a kind of property. In order to deprive a person of statutory rights there must be some justification for the discrimination. Membership in an organization that is seditious, i.e., advocates and commits acts designed to overthrow the government by force, is grounds for discrimination. But, in the absence of proof that membership in the Communist Party is *per se* seditious, the discrimination rests on political grounds, being analogous to depriving a man of statutory rights because he is a Republican or a Democrat.

The issue of the constitutionality of this provision has been raised in several cases. A regional director refused to count the ballots in an election involving the Oil Workers International Union, a C.I.O. affiliate, on the grounds that certain union officers had not filed non-Communist affidavits. The Oil Workers petitioned a federal district court in Texas for a mandatory injunction ordering the regional director to count the ballots. In denying the petition and ruling that the union was not eligible for certification, the court held that deprivation of "privileges" for failure to deny membership in the Communist Party is within the constitutional power of Congress to guarantee to every state a republican form of government. The decision is based on the premise that the Communist Party promotes the establishment of a dictatorial, rather than a republican, government, which led the judge to the conclusion that curbing its growth falls within the scope of Congressional power. *Oil Workers International Union v. Elliott,* 13 C.C.H. Labor Cases 64,016 (D.C., Texas, 1947).

The constitutionality of the affidavit requirement has been tested and sustained in at least three other cases, but there have been vigorous dissents. One of these cases, *National Maritime Union v. Herzog,* 22 LRRM 2215 (1948), reached the United States Supreme Court, but it was able to avoid ruling on the question because the petitioning union had also failed to comply with the provisions of the statute which require registration and the filing of financial reports.

The most significant aspect of Section 9 (h) has been its impact on both the establishment and maintenance of collective bargaining relationships. Many unions have thus far failed to comply with the

affidavit requirement. They have taken this position in part because of its "I've-stopped-beating-my-wife" character. More importantly, many unions feel that they are powerful enough to protect themselves by self-help devices against employer unfair labor practices, that they are well enough established and strongly enough organized so that representation questions will not arise, and that the procedure necessary in order to get a union shop is more trouble than the union shop is worth.

Moreover, individual employees can charge employers with unfair labor practices even though the union to which they belong is not in compliance—unless the employees are acting as agents of the union. At least this is true with respect to four of the employer unfair labor practices. However, it has no validity with respect to the employer unfair labor practice of refusing to bargain collectively. It is clear that the Board will not order an employer to bargain collectively with a noncomplying union because such an order is the equivalent of certifying the union as the collective bargaining representative, a status denied to a noncomplying union by terms of the statute. (The converse, however, is not true. A noncomplying union will be ordered to bargain collectively with an employer, even though, logically, such an order is also the equivalent of a certification. This somewhat inconsistent result was compelled by the fact that refusing to order a noncomplying union to bargain would not only be out of harmony with Congressional intent but would also place a premium on noncompliance.)

As of December 31, 1948, 178 international and national unions had complied. These figures include ninety-six of the A.F.L.'s 105 affiliates, twenty-eight of the C.I.O.'s thirty-seven nationals or internationals, and fifty-four out of fifty-five unaffiliated organizations, e.g., the International Association of Machinists. As of the same date 7,889 local unions had met the condition. However, this figure represents only about 12 per cent of the estimated 65,000 local unions in the United States.

While the number of complying unions has increased, the degree of noncompliance has been—and among local unions, remains —high. As a result many troublesome issues have arisen in representation cases. If an employer has requested an election because he is caught between the cross fire of two noncomplying unions, both of whom assert that they should be recognized, the NLRB must dismiss and leave the employer in the cross fire.

If two unions are involved, one having complied, but the other having not, the Board can put only the complying union on the ballot. If the noncomplying union in fact represents the majority of the employees (although they are unable to indicate their choice except negatively), this action can hardly be expected to resolve the matter. If the noncomplying union instructs its members to vote "no-union," the complying union will lose, whereupon the employer will be right where he was in the first place. The employer can, of course, sign a contract with the noncomplying union which in fact represents a majority of his employees, but he does so at his own risk. He still has in his employ a substantial minority of workers who belong to a rival union. And he can't discharge them without running the risk of being charged with the unfair labor practice of discriminating against his employees in order to encourage or discourage union membership.

Moreover, if an employer wants to utilize his new statutory right to petition the NLRB for determination of a representation question when only one union has presented a representation claim, his right is worthless if that union has not met the affidavit requirement.

Noncomplying local unions in industries affecting commerce have attempted to circumvent the affidavit requirement by having the complying parent organization file petitions for an election or by filing a petition with a state labor relations board administering a state statute which has no such requirement. Both attempts have been unsuccessful. In the situation where the noncomplying union seeks aid from a state board, the state board will either decline to assert jurisdiction, or—if it takes jurisdiction—can be enjoined by a federal court from taking further action.

Obviously the chief disadvantage of noncompliance to a union is the fact that it isn't able to get any NLRB help in representation or union shop matters. While this loss does not materially affect the well-entrenched unions, it does work serious damage on weak unions and also on strong unions which attempt to expand their jurisdiction. This is particularly true when rival unions have complied. Because of the necessity for protection against jurisdictional pirating, it seems reasonable—assuming that the provision survives the first session of the Eighty-first Congress—to expect the number of complying unions to continue to increase.

CHAPTER III

Subject Matter

THE TAFT-HARTLEY ACT materially increases the work load of the National Labor Relations Board over what it was under the Wagner Act. It is charged (or, rather, the General Counsel is charged) with the duty to prosecute sixteen unfair labor practices instead of five. It has the job of conducting five different types of elections instead of one. It has the burdensome task of resolving jurisdictional disputes—unless the disputants themselves reach an agreement within ten days. It is compelled by the statute to seek injunctions in the appropriate federal district court in four kinds of unfair labor practices, all of which can be committed only by unions.

REPRESENTATION CASES

THE BARGAINING UNIT

In the so-called "R" cases (that is, representation cases) the Board decides the bargaining unit appropriate in order to assure to employees the fullest freedom in exercising the rights guaranteed to them by the Act, but the new statute sharply limits the broad discretionary powers which the NLRB formerly exercised.

Section 9 (b) of the Wagner Act simply said: "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Under this broad grant of power the Board exercised wide discretion. In general, the answer to the question was determined by weighing seven factors: the extent and type of labor organization in the industry; the history of collective bargaining in the industry; the type of labor organization in other plants of the employer or of other employers in the same industry; the skill, wages, work, and working conditions of the employees; the eligibility of the employees for membership in the union or unions involved; the relationship between the bargaining unit or units proposed and the employer's organization, management, and operation; and the wishes of the employees.

The wishes of the employees were usually not determinative because the Board was ordered by the Wagner Act to decide the unit in order to effectuate the policies of the act, not in order to please the employees. The principle of self-determination was, however, the Board's rule of thumb for deciding whether a plant-wide or a craft unit was appropriate—if all other factors seemed equal.

Under the Taft-Hartley Act the wishes of the employees are important in two instances and inconsequential in a third.

By the terms of Section 9 (b) (1) no unit may include both professional employees, as defined in Section 2 (12), and nonprofessional employees, unless a majority of the professional employees vote for inclusion. Professionals are, however, employees within the meaning of the act, and are entitled to the statutory rights accorded to employees.

According to Section 9 (b) (2), no craft unit (undefined) may be deemed inappropriate on the ground that a different unit was established by prior Board order—unless a majority of employees (in the proposed craft unit) who vote cast ballots against separate representation. This section sets up a presumption that the craft employees desire separate representation. The presumption can be rebutted only if a majority of the employees (in the craft unit) *oppose* separate representation.

Section 9 (b) (2) is not only important when the Board is making its initial determination of the appropriate unit, but it is also important in enabling craft units to disturb existing plant-wide bargaining relationships by challenging the right of the plant-wide union to continue to represent them.

However, the section has not been as meaningful as it was originally thought it would be. The NLRB, construing the language literally, has held that, while it may not deem a craft unit inappropriate on the grounds that a different unit was established by prior Board order, it may decide that a craft unit is inappropriate on some other grounds, e.g., the history of collective bargaining in the plant. As a consequence, the NLRB has refused to carve out a craft unit of bricklayers from an industrial unit in a plant where the production process is well integrated and the history of bargaining is along industrial lines.

On the other hand, if the employees are highly skilled, must serve a long apprenticeship before becoming journeymen, and perform tasks which are severable from other plant operations, the

Board may approve the craft unit as appropriate for bargaining—despite a history of larger-group bargaining.

No unit can be deemed appropriate under the Act if it groups plant guards together with other employees. Plant guards are defined by Section 9 (b) (3) as individuals employed to enforce against employees and others rules to protect the employer's property or to protect the safety of persons on the premises. Thus, a watchman, even though he is not armed, deputized, or uniformed, who makes the rounds of the plant, punches clocks, fires boilers, and keeps steam pressure up, is a plant guard and cannot be included in a bargaining unit for rank-and-file employees. Moreover, the Board is shorn of its power to certify as the bargaining representative for plant guards any labor organization that admits to membership other employees. These provisions cancel a Wagner Act decision of the Supreme Court sustaining the NLRB's holding that plant guards are employees entitled under law to be represented by a union affiliated with a labor organization that represents rank-and-file workers. *NLRB v. Jones & Laughlin Steel Corp.*, 67 Sup. Ct. 1274 (1947).

CERTIFICATION OF THE UNION

Upon an allegation that either a majority of employees wished a union to represent them, a wish which the employer had refused to grant or the existence of which another union had denied, or some union other than the current bargaining agent now had majority support, the Wagner Act Board (working through its regional directors) would investigate, provided that the allegation was made by an employee or group of employees or a labor organization acting on behalf of employees. The regional director would not investigate a petition filed by an employer unless *two or more* persons or labor organizations each claimed to represent a majority of employees in the unit (although the employer might get before the Board on the question by refusing to extend recognition to the union, in which case he ran the risk—unless his refusal was based on a good faith doubt as to the union's majority strength—of being found guilty of an unfair labor practice, i.e., refusing to bargain collectively).

This rule restricting employer petitions was adopted by the NLRB as a protection against an employer's calling for an election during the early stages of the union's organizational campaign when it obviously would be defeated. It is changed by Section 9 (c) (1) of the Taft-Hartley Act. Now the Board must investigate a petition

filed by an employer and alleging that *one or more* unions or individuals have presented to him a representation claim. The change, although it clearly alters the Board's former rule, does not remove all protection given to the organizing union, because the employer's petition is groundless *unless the union has presented a representation claim.* No union is likely to present a representation claim until its organizational campaign has matured. Moreover, the union can, by withdrawing its representation claim after the employer has petitioned for an election, cause the Board to refuse the petition and hence protect itself against the possibility of unfavorable election results which would frustrate for a year any attempts to get NLRB recognition.

The effective argument for extending the employer's right to petition is that it makes it possible for employers to get an official determination on the representation question—when there is only one union involved—without running the considerable risk of being successfully charged with an unfair labor practice.

The counter argument against the particular provision involved is that it may be open to abuse. Board rules, following the apparent intention of the statute, state that

> in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required, and the regional director proceeds with the case if other factors [the matter affects commerce; the unit is appropriate; and the election will effectuate the policies of the act and reflect the free choice of the employees] require it . . . .

Thus, it is conceivable that an employer who wishes to stop an organizational drive by a union in his plant may prematurely force that union into an election which it will lose, by encouraging one or more individuals or another labor organization, even though he or it has no substantial support, to present him a claim of recognition as the bargaining representative.

Moreover, since Section 9 (c) (3) states that an election cannot be held more than once every twelve months, an employer who successfully works such a device can stymie the union for at least a year, at the end of which he can go through the same procedure.

The flaw in this argument is that the NLRB will not investigate such a petition unless "it has reasonable cause to believe that a question of representation affecting commerce exists . . ." and that "the election will effectuate the polices of the act." These clauses leave a loophole for the exercise of Board discretion, and it is ex-

tremely unlikely that a regional director would be duped by the rather transparent subterfuge outlined above into thinking that a bona fide "R" question existed or that an election would effectuate the policies of the act.

There is considerable reason to believe, based on the experiences under the New York State Labor Relations Act (which grants to employers an extensive right to petition), that the rule will work satisfactorily.

DECERTIFICATION OF THE UNION

Under the Wagner Act employees could challenge the status of an established bargaining agent only if they could show substantial support for a rival union. Under Section 9 (c) (1) (A) of the Taft-Hartley Act employees can challenge the position of a union by showing substantial employee support—that is, 30 per cent support —for getting rid of it and returning to a no-union situation.

This is called a decertification proceeding because it may be solely a petition to get rid of a union rather than a petition to replace one union with another.

The Board investigates in order to determine whether or not it should initiate decertification proceedings if the petition is filed by an employee, a group of employees, or a labor organization alleging that the certified or currently recognized bargaining representative no longer has majority support. An employer, while he can petition for determination of a representation question when a union is first seeking to establish its status, cannot successfully file a petition asking for decertification.

Section 9 (c) (1) (A) represents an important change in federal labor policy and like, although to a lesser extent, the inclusion in Section 7 of the employees' right to "refrain from any or all . . . [union] activities" indicates the contradictory aspects of Title I of the Taft-Hartley Act. If there is a public interest in the establishment and maintenance of collective bargaining, as Section 1 says there is, then it seems anomalous to permit the termination of one collective bargaining relationship without replacing it with another.

If one accepts the proposition that the important freedom of individual workers is their ability to participate in collective bargaining in the way that they desire, not their ability to refuse to participate at all, the Board's policy under the Wagner Act of setting up machinery whereby employees could change bargaining

representatives at appropriate times seems sounder than the establishment of machinery whereby the employees can decide to have no representative at all.

The maintenance of a particular collective bargaining relationship is, however, protected to some extent. Decertification proceedings are limited, not only by the rule that a representation election cannot be held more than once a year, Section 9 (c) (3), but also by the retention of the Board's Wagner Act policy of refusing to initiate proceedings if there is outstanding a collective agreement of reasonable duration (generally not more than two years).

Since they are denied a place on the ballot in certification elections, noncomplying unions have argued that they must also be denied a place on the ballot in decertification elections. The Board has, however, decided against this argument on the grounds that the statute prohibits the NLRB from investigating a representation question raised by a noncomplying labor organization but does not prohibit it from investigating decertification questions involving a noncomplying labor organization but raised by employees and that to permit a union to immunize itself from a decertification proceeding by virtue of its noncompliance would place a premium on noncompliance, a result contrary to Congressional intent. *Harris Foundry & Machine Co.,* 21 LRRM 1146 (1948). In this same decision the Board attempted to avoid the anomalous implications of a noncomplying union's winning a decertification election by saying that, in such an event, it will only certify the results of the election.

It should be emphasized again that, while the General Counsel has final authority to investigate charges and issue and prosecute complaints of unfair labor practices, he does not have final control over representation cases.

CHANGES IN PROCEDURE

A significant procedural change is effected by Section 9 (c) (1) which states that if the Board has reasonable cause to believe that a representation question affecting commerce exists, it *must* provide for an appropriate hearing upon notice (which may be conducted by a field attorney who has, however, no power to make recommendations to the Board); and if the Board upon examination of the record of that hearing agrees that such a question exists, it *must* direct an election by secret ballot and certify the results.

The importance of this limitation becomes apparent when one examines the operation of the Board's representation machinery under the Wagner Act. Section 9 (c) of the Wagner Act read: "Whenever a question affecting commerce arises concerning the representation of employees, the Board *may* investigate . . . and certify . . . the name or names of the representatives that have been designated or selected." By inference, the Board could decline to institute formal proceedings. If the Board did institute formal proceedings, the statute said that it had to provide for an appropriate hearing upon due notice, and that it might "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

INFORMAL PROCEDURES UNDER THE WAGNER ACT

Consequently, in order to save both time and money, the Board's Wagner Act rules permitted a regional director to utilize—when a proper petition was filed—six time-saving devices for resolution of a representation question.

The first of these was the simple *recognition agreement,* executed subject to the approval of the regional director, by the terms of which the employer simply agreed in writing to recognize the union as the collective bargaining representative. This device was used when only one union alleged that it had majority support. The regional director refused to approve it unless he was satisfied that the union had majority support and unless the text of the agreement had been posted in the plant for five days and no employees or interested parties had objected.

The second was the *consent election agreement* entered into by the employer and any union representing a substantial number of employees (usually the union had to show 30 per cent support). Under the terms of this agreement, which might be utilized in cases involving more than one union, the parties agreed on the appropriate unit, the pay roll to be used to determine voting eligibility, and the place, date, and hours of balloting in an election conducted under the supervision of the regional director. They further agreed to be bound by the rulings of the regional director on challenges to the ballots or objections to the conduct of the election.

The third was the *stipulated election agreement,* which differed from the consent election agreement only insofar as it authorized the NLRB, not the regional director, to rule on postelection issues

and involved a Board certification rather than a determination by the regional director.

The fourth was the *consent cross-check agreement* entered into by the same parties. This agreement, utilized in cases involving only one union, specified the method of conducting the consent cross-check, and usually it involved a comparison between union authorization cards and the employer's pay roll. The consent cross-check was conducted under the supervision of the regional director, and his rulings on all matters in question and his determination of the results were final. If the results of the election were favorable to the union, they were posted in the plant for five days in order to give the employees and interested parties an opportunity to object.

The fifth was the *stipulated cross-check agreement,* which differed from the consent cross-check agreement only insofar as it involved final rulings by the Board, rather than the regional director, on any questions raised by the parties, e.g., eligibility to vote, which were not covered in the agreement.

The sixth device was the *prehearing election,* which—although a timesaver—was a formal, not an informal, procedure. The regional director ordered the parties to follow this procedure if he felt that the lack of substantial issues justified holding an election before a hearing. After the election, a hearing—conducted in a manner consistent with the formal procedures outlined below—was held, if the parties requested it. The prehearing election procedure was usually utilized when questions about who was eligible to vote arose, and it was sensible to conduct an election before holding hearings on the issue of eligibility in order to see whether or not a ruling on the point was relevant. For example, in a unit of 1,000 employees, 100 of whom the employer claimed were not eligible to vote, the regional director would conduct a prehearing election and impound the challenged votes—unopened. If 600 unchallenged votes were cast for Union X, a hearing on the 100 challenged votes would be unnecessary because a determination could not possibly affect the election results. However, if one of the parties wanted a hearing and a Board determination anyhow, he could get it. If none of the parties had any objections, they waived the hearing and abided by the results of the election.

From 1935 to 1945, 19 per cent of all petitions raising representation questions were withdrawn at the request of the regional director working through his field representatives, usually field exam-

iners; 7.9 per cent of them were dismissed by the regional director—subject to appeal to the Board; and 49.8 per cent of all cases were settled by resort to the recognition agreement, the consent cross-check, the stipulated cross-check, the consent election, or the stipulated election. Only 23.3 per cent of the petitions actually were settled by formal proceedings (either prehearing elections or post-hearing elections).

HEARING-BEFORE-ELECTION PROCEDURES UNDER THE WAGNER ACT

If the representation question was not resolved through resort to one of the streamlined devices mentioned above and the regional director thought that substantial issues stood between the parties, he served a notice of hearing upon the employer and other interested persons (the union or unions involved). A member of the regional field staff, usually a field attorney, was designated to hold the hearing, which was conducted in a manner similar to that followed in unfair labor practice cases. After the hearing, the regional director transferred the case to the Board. The Board either acted on the record or ordered a further hearing. Within seven days after the hearing, the parties could file briefs and ask to argue orally before the Board. In either case (deciding on the record or after further hearing), the Board either ordered the regional director to conduct an election by secret ballot or dismissed the petition. If there were challenges to the ballots or objections to the conduct of the election, which was conducted within 30 days after the Board order directing it, a member of the regional field staff investigated and prepared a report which he sent to the Board, with copies to the parties. If exceptions to this report were filed and the Board thought that they raised sustantial issues, it ordered a further hearing. At the conclusion of this hearing, a report was sent to the Board for final disposition (certification or dismissal). If the Board thought that the exceptions raised no substantial issues, it certified or dismissed on the basis of the record.

If there were no challenges or objections to the election, the Board simply decided the case on the basis of the tally of ballots.

If a run-off election was necessary because no choice had received a majority of votes cast, it was conducted by the field agent without reference to the Board, provided, however, that one of the parties entitled to a run-off had requested it and that no objections to the first election had been filed. After the run-off election results

were tallied, the procedure outlined above was followed. Only one run-off election was held.

SPECIFIC PROCEDURAL CHANGES EFFECTED BY THE TAFT-HARTLEY ACT

The Taft-Hartley Act removes a large part of the Board's discretionary powers and partially substitutes rules of law for rules of policy. However, in so doing, it makes the settlement of such matters slower, more expensive, more cumbersome—and no more accurate—than was the case under the Wagner Act.

The *prehearing election,* the *consent cross-check,* the *stipulated cross-check,* and the *recognition agreement,* which probably took care of about 25 per cent of the "R" cases under the Wagner Act, are relegated to history; and the Board's task of determining representation questions is more onerous than it was before.

Some of the streamlined procedures are, however, still in effect. Section 9 (c) (4) permits the parties to waive hearings by stipulation for the purpose of conducting a consent election. And the Board has utilized two types of consent elections: (1) the consent election agreement, followed by the regional director's determination; and (2) the consent election agreement, followed by Board certification (this is analogous to what was formerly known as a stipulated election). The only difference between the two is that the latter agreement provides that the election shall be the basis for a formal decision by the Board instead of a determination by the regional director. Therefore, the agreement provides that the Board, rather than the regional director, shall make the final determination of questions raised concerning eligibility, challenged votes, and the conduct of the election.

Section 9 (c) (2), read in conjunction with Section 10 (c), is aimed at the NLRB's Wagner Act practice of discriminating against independent unions (unaffiliated with a national or international). Under the old act if an independent union was found to be company-dominated, it was ordered disestablished, and both it and its successor—unless a clear line of cleavage existed—were forever barred from a place on an election ballot. At the same time the Board refused to order disestablishment of an affiliated union found to be company-dominated and subsequently placed it on the ballot, after the union had freed itself from domination, and conditions permitting a free choice by the employees existed. The Board must now apply the same policy to both affiliated and unaffiliated unions, and

it has decided to retain the remedy of disestablishment and apply it to both affiliated and unaffiliated unions found to be employer-dominated. However, if a union is employer-assisted or supported but not dominated, it will not be disestablished—regardless of whether it is independent or affiliated—and will subsequently be placed on a ballot if the employer's support and assistance has ceased and an atmosphere permitting a free expression of preference by the employees obtains.

Two important changes regarding the actual conduct of the elections have been made. The first change concerns the matter of who is eligible to vote. Under the Wagner Act the Board held that the following persons could cast valid ballots: (1) all those on the pay roll in the appropriate bargaining unit immediately before the Board directed an election; (2) all persons laid off, ill, temporarily away without cause, or on a vacation, etc.—if they might reasonably anticipate returning to work; (3) economic strikers, e.g., persons who had struck because of a dispute over wages, hours, or conditions of employment (both the strikers and their replacements could vote, if the latter were hired before the employer refused an unconditional offer by the strikers to return to work); and (4) persons who had struck because of the employer's unfair labor practice (only the strikers, not their replacements, could vote). Section 9 (c) (3) specifically says that employees on strike not entitled to reinstatement are not eligible to vote. Accordingly, ineligibles include (1) those persons who have struck as a consequence of a labor dispute—economic strikers—and have been permanently replaced; (2) strikers who have committed unlawful acts, including mutiny (when sailors strike), sit-down striking, committing acts of serious violence and destruction while on strike, engaging in mass picketing, and striking to force an employer to commit an unlawful act—such as striking to force an employer to recognize one union when another union has been certified, or striking to force an employer to grant a wage increase in violation of the federal wartime law dealing with wage stabilization; (3) workers who strike in violation of a collective bargaining agreement; and (4) workers who strike before sixty days have elapsed after the union has notified the employer that it wishes to terminate or modify an existing collective bargaining agreement. See Section 8 (d).

The second change concerns the run-off election. If none of the choices receive a majority, such an election must be held. Under the

Wagner Act the Board conducted a run-off only if it was requested. Moreover, by the terms of Section 9 (c) (3) the two choices receiving the largest and second largest number of valid votes must be listed on the ballot. This rule was not always observed under the Wagner Act. Suppose, for example, that in a unit containing 100 employees, union "X" and union "Y" each claimed a majority, and the NLRB ordered an election in which the ballot read: "X"____, "Y"____, and "Neither" ____. Suppose further that all 100 employees voted and that "X" received twenty-five votes, "Y" received forty votes, and "Neither" received thirty-five votes. Following Wagner Act policy, the Board, reasoning (1) that "Neither" had received less votes than one of the unions, (2) that each union had received at least 20 per cent of the votes cast, and (3) that a majority of the employees had indicated that they wanted some kind of union, would direct a run-off between "X" and "Y." Following the Taft-Hartley rule, the Board directs a run-off between "Y" and "Neither."

COURT REVIEW

Under the Wagner Act the refusal of a regional director to grant a representation petition, or to approve a consent agreement, or to conduct an election because, among other reasons, he did not think that a question affecting commerce was involved or because there was no showing that a substantial number of employees favored any one union (the 30 per cent showing mentioned above) could be appealed to the Board. But the Board's ruling on the matter was terminal—that is, there could be no appeal to a court—because it was not a final order subject to judicial review. Moreover, the Board's ruling on the certification question itself was not a final order subject to court review.

In addition, preliminary proceedings by the Board in representation cases and the conducting of elections could generally not be attacked successfully. However, in a few cases unions were able to persuade courts that the Board had abused its discretion and had denied them property without due process and were able to obtain injunctive orders because of a threat of irreparable injury. For example, in *R. J. Reynolds Employees Ass'n., Inc. v. NLRB,* 61 F. Supp. 280 (D.C. M.D. N.C., 1943) the court enjoined the Board from leaving the union's name off the ballot in an election.

An employer was able to get court review of a representation case in only one way. If, after the union was certified, he refused to

bargain collectively with it, he could assert error in the certification as a defense to the unfair labor practice action brought against him, and thereby ultimately get a court review on the question. By and large, this was also the only avenue open to a defeated union, which might enter the unfair labor practice proceeding as an intervening party.

These general rules concerning court review remain unimpaired by the Taft-Hartley Act. In *Ohio Power Co. v. NLRB,* 13 C.C.H. Labor Cases 64,090 (1947), the court said that a Board order certifying a union as the bargaining representative will not be reviewed. The court pointed out, however, that if the Board in an unfair practice proceeding promulgates an order based in whole or in part on a certification, a court will review the certification as part of the record. In the court's opinion, the Federal Administrative Procedure Act of 1946 has not extended the judicial power to review certifications.

However, in *Oil Workers International Union v. Elliott,* cited above in connection with non-Communist affidavits, the court said that since no situation should exist in which a person can be deprived of property or privilege without resort to a judicial tribunal, a federal district court can review a preliminary determination by an NLRB agent—in this case the refusal by a regional director to count ballots because certain union officers had not signed non-Communist affidavits. "We think," said the court, "under the recent legislation of Congress that the right of review is very clear."

NATIONAL EMERGENCY DISPUTES

When, pursuant to Sections 206, 207, 208, 209, and 210, the President has appointed a Board of Inquiry which has confirmed his opinion that a strike or lockout will, or is, imperiling national health or safety, and the Attorney-General of the United States has, at the President's direction, obtained a court injunction imposing an eighty-day cooling-off period, the NLRB must—if the dispute is still unsettled at the end of sixty days after the injunctive order was issued—take a secret ballot of the employees of each employer involved, asking them the question: "Do you wish to accept the final offer of settlement made by the employer?"

This election must be conducted within fifteen days after the end of the sixty-day period, and the results must be certified to the Attorney-General within five days after the vote. As soon as he receives this certification, the Attorney-General is directed by the

statute to ask the court which issued the injunction to discharge it, and the court is directed to grant this motion. If the employees' answer to the question has been "No," and the dispute still exists, the President submits to Congress a full report of the proceedings, together with recommendations for Congressional consideration and action.

These provisions are the answer of the Eightieth Congress to the problem of the strike or lockout which may be calamitous, or nearly so, in its impact on the national economy—the problem which was so sharply raised by the railway strike in the spring of 1946, the bituminous coal strike in the fall of the same year, and by numerous strikes in public utilities and other vital activities during 1946, 1947, and 1948.

The answer does not seem entirely adequate.

Experience with cooling-off periods has not proved them to be an effective solution to the problem. The presumption upon which such statutory limitations are based—that strikes and lockouts are frequently called hastily, without careful deliberation or serious attempt to resolve differences peacefully—is not well founded.

The cooling-off period in itself solves nothing. It simply postpones strike or lockout action. It therefore serves no useful purpose unless the parties themselves desire to utilize the period to reach agreement; and there is no reason to believe that parties who cannot reach agreement through negotiations conducted during the pre–cooling-off period will suddenly resolve their differences when the federal injunction temporarily removes their weapons.

In fact, there may be less reason. In a substantial proportion of employer-union relationships, the existence of effective economic weapons which may be utilized by one party or the other if agreement is not reached is a *sine qua non* of serious collective bargaining. The suspension of strike and lockout during the cooling-off period may well mean that the parties concerned simply will not seriously entertain one another's demands until the period has expired. If this is the case, the cooling-off period not only will fail to bring the parties closer together, but it may leave them further apart; for the history of labor-management disputes suggests that the longer a dispute remains in existence, the more difficult it is to settle short of complete capitulation by one party or the other.

Of course, the appointment of a Board of Inquiry will focus national attention on the dispute. This fact, aided by the publication

of the Board's first and second reports (one issued at the beginning of the cooling-off period, the other issued at the end), may mobilize sufficient public opinion to cause the disputing parties to act more reasonably. This, however, is an argument for the Board of Inquiry, rather than an argument for the cooling-off period. If the functioning of the Board of Inquiry has a helpful effect on the attitude of the employer and/or the union, it is likely to have that effect whether or not there is a cooling-off period.

The provision in the Taft-Hartley Act calling for a last-offer election is tinctured with the assumption that unions alone refuse arbitrarily and unreasonably—and without reference to the wishes of those whom they represent—to accept the other party's last offer. If this is not the assumption, then the statute should logically call upon the NLRB to conduct a secret ballot of the stockholders (when the employer is a corporation) as well, asking them: "Do you wish to accept the final offer of settlement made by the union?"

As of November 1, 1948, the employees had overwhelmingly rejected the last offer of the employer in the elections that had been held. In fact, in one—the referendum involving the West Coast longshoremen—not a single vote was cast.

During the first sixteen months after the Taft-Hartley Act was passed, six injunctions imposing eighty-day cooling-off periods in emergency disputes were issued. In three instances settlement was effected during the eighty-day period (but in one case only after the union struck in violation of the injunction and was convicted of contempt); in the other three cases settlement was made after expiration of the period, agreement in two of the cases coming several weeks subsequent to termination of the injunction, and then only after a prolonged strike. While it is difficult to assess cause and effect and hence to evaluate the effectiveness of the cooling-off period imposed by injunctive order, it seems reasonably clear that in some cases it helped to bring settlement without a prolonged work stoppage. However, it is also clear that the cooling-off period has not served as a panacea. Costly work stoppages did occur, and the West Coast longshoremen's dispute was probably prolonged rather than shortened by the imposition of the cooling-off period.

Strikes or lockouts which imperil public health and safety raise very fundamental issues, the resolution of which may seriously strain the functioning of a democratic society. An injunction against union leaders and the union itself may terminate the work stoppage, or—

if it does not—a contempt proceeding against the union and its leaders may do the trick, as it did in the bituminous coal strike of 1946. See *United States v. United Mine Workers of America,* 675 Sup. Ct. 677 (1947).

But there remains the question of how far the government can effectively intervene against individual workers. Court orders restraining their leadership and cutting off payment of strike benefits, plus the risk of discharge by the employer, will normally cause workers to return to their jobs. But if workers in a union-dominated industry (such as railroads or coal), where ready replacements are not available, persist in striking, then nothing short of President Truman's work-or-join-the-army suggestion of 1946 is likely to get them back on the job very quickly. The issuance of such an order not only would impose involuntary servitude within the literal meaning of the Thirteenth Amendment, but it would hardly produce good labor relations and high worker productivity.

Added to these considerations is the fact that the workers may have equity on their side in a dispute. The employer may conceivably adopt an adamant attitude toward jutified demands and utilize the public-interest character of his business to force governmental intervention in his favor. The result might then leave the workers without an effective remedy in an essentially unfair employment situation. The government, faced with the necessity of maintaining operations in the industry, would merely stabilize economic inequity.

Punitive and coercive methods for solving such strikes are less significant than positive methods for minimizing the possibility that the issues which provoke such strikes arise.

There is much to be said for Professor Sumner Slichter's suggestion that we should frankly recognize that the strike which imperils public health and safety is concerted action which society simply cannot tolerate; and that we should proceed to extend to employees in industries whose continuous operation is vital to the public interest (in consideration for their loss of the right to strike) privileges not extended to employees engaged in other industries. Among these privileges, he suggests, should be the guaranty of a yearly wage review and more liberal vacation periods and pension rights than other employees enjoy.

But a governmentally guaranteed wage review is only a short step removed from another War Labor Board. And another War Labor Board probably means another OPA. Both institutions are

alien to valid concepts of free enterprise and free collective bargaining.

This problem is troublesome, and it is likely to become more so. The concentration of economic power in the hands of a relatively few corporations, the development of vast trade-unions, and the existence of industry-wide or multi-employer bargaining, coupled with the interdependence of our specialized society, leaves us in a situation where the prolonged breakdown of labor relations in many industries other than those traditionally regarded as public utilities has an extremely severe empact on the economy. This is particularly true in times of a continuing world crisis.

If labor relations in electricity, gas, water, communications, and transportation require special attention and even governmental intervention, why not labor relations in steel, coal, aluminum, airplanes, electrical equipment, and even in meat packing, automobiles, and rubber? The line between prolonged work stoppages which society can tolerate and those which it cannot is increasingly hard to draw.

An alternative solution is for the government to enjoin the threatened work stoppage, seize the plant and operate it, pay a specified rental to the owner, turn the profits of the business and the union dues into the federal treasury, and direct top-level management and the union leaders to resolve their differences as a condition precedent to resuming private operation. The form of private agreement (as distinguished from governmental dictation of the terms of settlement) would thus be preserved, interruption of production would be prevented, and the parties would be placed under a severe compulsion to reach a settlement. The proposed remedy is a drastic one, certainly not in line with concepts of "free" collective bargaining, but it emphasizes the kind of price that must be paid in terms of loss of freedom if we are serious about preventing work stoppages resulting from labor-management disputes.

UNFAIR LABOR PRACTICES COMMON TO UNIONS AND EMPLOYERS

COERCION OF EMPLOYEES

The Wagner Act was grounded on the premise that collective bargaining could not achieve the economic objectives of the statute unless large numbers of employees were represented by strong unions. To recapitulate, these objectives were (1) prevention of

depressed wage rates which decrease the purchasing power of wage earners and aggravate business depressions, (2) encouragement of the stabilization of competitive wage rates and working conditions within and between industries because instability aggravates business depressions.

Title I of the Taft-Hartley Act, while it sets out these same objectives, is grounded on the premise that collective bargaining can attain them whether or not employees are represented by strong unions. To put this a different way, the 1947 statute assumes that it is a matter of public indifference whether or not collective bargaining exists in a particular plant or industry.

Nowhere is this fundamental assumption made clearer than in Section 7 which adds to the employees' right to engage in union activity (a carry-over from the Wagner Act) "the right to refrain from any or all such activities . . ." except to the extent that such right may be affected by a lawful union shop agreement. The addition takes on significance when coupled with the duty of employers (another carry-over) not to interfere with, restrain, or coerce employees in the exercise of the rights set out in Section 7 and the newly established duty of labor unions and their agents not to restrain or coerce employees in the exercise of those rights.

Continued protection from employer interference of the employees' right to organize and bargain collectively means that an employer still has the duty not to do any of the following: (1) use an espionage system to secure information about the employees' attitudes toward unionization and union activities; (2) fail to give to all his employees reasonable protection against physical assaults by nonunion employees and supervisors in order to discourage union activity; (3) bribe or attempt to bribe employees for antiunion purposes, e.g., by offering an employee a lifelong contract of employment if he stays out of the union, increasing employees' pay if they abandon the union, offering employees a profit-sharing contract if they agree not to organize and/or to bargain collectively for two years; (4) conduct employer-supervised elections to determine the amount of union support; (5) circulate loyalty pledges or antiunion petitions; (6) prohibit an "outside" union from organizing on company time and property but permit an "inside" union to so organize; (7) negotiate a "yellow-dog" contract; (8) threaten to move the plant if there is successful organization by a union; (9) use strikebreakers; (10) by-pass the union and make appeals directly to the

striking employees for the purpose of either (a) persuading the employees to bargain individually or (b) persuading the employees, by means of special inducements, to return to work.

Extending protection to include the employees' right *not* to organize and bargain collectively is entirely new. Giving the right to refrain from union activity equal status with the right to engage in union activity establishes some legal obligation for employers. For example, an employer in a closed shop industry who wishes to continue the arrangement cannot threaten an employee with any kind of reprisal for refusing to become or to remain a union member —unless a lawful union shop agreement is in effect.

But the real impact of the extension is felt by unions and union agents engaged in organizing, striking, and picketing. Making it an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their right not to engage in union activity is one of the policy shifts which has been widely defended, largely because of empirical data indicating that unions have in some instances coerced employees into joining or participating against their will by threatening violence to them and/or their families and engaging in other forms of intimidation.

Presumably, however, a union organizer can propagandize with impunity, e.g., tell workers that they will be wage slaves if they don't unionize. This presumption is strengthened by Section 8 (c) which says "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute *or be evidence of* an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

A good guess is that most union activity which falls short of violence, threats of violence, threats of reprisals or fraud is privileged. Mass picketing, because of the implied threat of physical harm, is generally an unfair labor practice. On the other hand, peaceful picketing for organizational purposes and promises of benefit to the worker if he joins the union do not generally violate this section.

Close questions are posed by union threats to increase dues and fees if the employee doesn't join before the union gets bargaining rights, threats to obtain a union shop and get the worker discharged by denying him membership (frequently an effective kind of pressure, even though such discrimination would now be unlawful),

and other threats of economic, as distinguished from physical, reprisal.

The above remarks are, of course, speculative. "Restraint" and "coercion" are broad labels, the factual content of which will have to be defined by extensive litigation. Given a tough construction, this section deals very effective blows at trade-union attempts to expand jurisdiction (for example, the organizational drives in the South of both the C. I. O. and A. F. L.) and strike-support activities such as picketing. Even given a soft interpretation, the section makes organizational and strike-support activities more risky than they were heretofore. This is particularly true because, in determining whether or not a union is legally responsible for the specific acts of an organizer or a picket-line captain or perhaps even a union member on the picket line, the question of actual authorization or ratification is not controlling. Thus union representatives who direct strikes and picketing for the union make it responsible for all of their unlawful conduct and perhaps for all of the unlawful conduct that occurs on or near the picket line, even though the union has specifically forbidden the act in question, so long as the union sponsored, supervised, or incited the picketing; and if an international union associates itself with a local in support of striking and picketing, it may become liable for the members' conduct on or near the plant site if the agent of the local union makes no attempt to dissuade the pickets from participating in the unlawful act, e.g., a demonstration of force.

There was some Congressional feeling that labor organizations should be as neutral with respect to whether or not employees join or support unions as employers. But the deletion of "interfere" seems to indicate that this feeling did not prevail fully. Employers are under the obligation not "to interfere with, restrain, or coerce employees" in the exercise of their rights while unions are bound not "to restrain or coerce." However, the omission of the words "interfere with" from the union duty is probably not very significant, since the Wagner Act Board did not make any particular distinction between interference, restraint, or coercion. But, even if it is significant, something of an incongruity in federal labor policy has been produced.

The Wagner Act set out as an objective the encouragement of the practice and procedure of collective bargaining on the grounds that the effective operation of that institution is in the public inter-

est. The National Labor Relations Act of 1947 reiterates that objective and for the same reason. If collective bargaining is in the public interest, inferentially—since the two are mutually exclusive—individual bargaining is not. Therefore, granting the premise, sound public policy should favor collective bargaining and disfavor individual bargaining.

Since strong unions are a *sine qua non* of collective bargaining, collective bargaining cannot achieve the economic objectives designated by the statute as being in the public interest unless large numbers of workers belong to strong unions. Accordingly, while it is clearly intolerable and contrary to our notions of individual liberty to force all workers to join some union and thereby restrict their freedom of choice to the matter of which union they shall join, it does seem possible to work within the framework of freedom by setting up legislative policies which—negatively, at least—encourage employees to join labor unions.

This policy means, among other things, that unions should be given reasonable powers (not including, of course, threats of violence—implied or express) to persuade, influence, and propagandize. It means, moreover, that it is more important to permit unions to persuade employees to participate in collective bargaining than it is to permit employers to persuade them not to participate.

The problem is one of balance between the individual freedom not to associate and the public interest in the establishment and operation of collective bargaining relationships. To put this another way, we have the problem of determining the degree to which we should permit private interference with the individual employee's freedom not to participate in any collective bargaining relationship because of the public interest in having him participate.

Moreover, a balance must be struck between an employer's freedom to persuade his workers not to join any union, a union's freedom to persuade workers to join a particular union, and—again—the public interest in having him join some union.

The Wagner Act embodied policies which served the public interest involved in the establishment of collective bargaining relationships without destroying individual freedom by limiting the exercise by employers of their peculiarly effective influence over employees and by failing to limit union attempts to get workers to participate in collective bargaining. The policy worked because the presumption that large numbers of workers would participate in

collective bargaining if they were freed from employer restraint and coercion was well founded.

Only litigation will determine the degree to which the Eightieth Congress, by giving the right not to engage in collective bargaining equal status with the right to engage in collective bargaining, contradicted itself. But it seems clear that if Congress thinks that collective bargaining is in the public interest, it cannot logically be indifferent to whether or not workers join unions.

DISCRIMINATION AGAINST EMPLOYEES IN REGARD TO HIRE OR TENURE

BY EMPLOYERS

Employers are required by Section 8 (a) (3), as they were under the Wagner Act, not to discriminate against employees for the purpose of encouraging or discouraging union membership. The wording of the unfair labor practice remains the same, but other sections of the Taft-Hartley Act alter its practical meaning.

Under the Wagner Act an employer could fire, demote, transfer, and lay off capriciously (for example, as a result of personal animosity), but he could not do these things to employees in order to discourage them from belonging to a union. Examples of discrimination which constituted an unfair labor practice under the orginal NLRA are: (1) firing a nonunion employee because her husband was active in the union; (2) refusing to reinstate employees after a strike was terminated because they were union men; (3) refusing to hire two men because of their union membership.

The Board's test of guilt in these cases was motivation. If one of the motives was to discourage union membership, an unfair labor practice had been committed. As an illustration, see the case of *NLRB v. Arcade Sunshine Co.*, cited above. The president and a foreman testified that the employee had been discharged because he was an incompetent drunkard. But there was evidence showing that the president and the foreman had both questioned him about attending a union meeting, which he had denied, whereupon the president had said, "You can't fool me; I know." There was further evidence to show that the employee had been asked to sign a "loyalty" pledge but had refused—a few weeks before the discharge. Finally, there was evidence that when the employee had asked the employer for reinstatement, the latter had said: "You talk too much around here; you walk around and talk about the union." The

Board found that there had been a discriminatory discharge, despite the fact that it agreed that the employee had been drunk on the day of discharge. The circuit court of appeals sustained.

While motive is still the determinative factor under the Taft-Hartley Act, the result is likely to be different in cases where dual motives exist. First, Section 10 (c) states that an employer can discharge any employee for cause and be free of the effective penalty, i.e., reinstatement with back pay. Second, the Board's order must rest on a preponderance of testimony—a restriction designed to limit the Board's power to draw inferences as to "real" motive, almost always a necessity in a discrimination case. Third, the Board, while following the rules of evidence "insofar as practicable," must also follow the rule of evidence explained above—to wit, expressing or disseminating any views, arguments, or opinions—regardless of the form of expression or the form of dissemination—shall not constitute or be evidence of an unfair labor practice unless such expression contains a threat of reprisal, a threat of force, or a promise of benefit. Thus, in the example, the employer's remarks probably would not be admissible as a basis for finding that antiunionism was the motive.

But even though discharges are legal because they are made for cause, the selection of the particular employees discharged may be illegal. Thus, if an employer, after a strike, discharges 150 employees because of curtailment of his business, he *ipso facto* commits no unfair labor practice. But if in selecting the 150 employees for discharge, he chooses twelve strikers for every one nonstriker (when the ratio of strikers to nonstrikers in his entire labor force is only 2 to 1), and several union members who are discharged have greater seniority and ability than several nonunion employees who are retained, and his personnel director admits that participation in the strike was considered in making up the discharge roster, a Board finding that some of the particular discharges were discriminatory may be sustained. This was the holding of the court in *NLRB v. Sandy Hill Iron & Brass Works,* 13 C.C.H. Labor Cases 64,098 (C.C.A. 2nd., 1947).

BY UNIONS

Under Section 8 (b) (2) of the Taft-Hartley Act a union or union agent who causes or attempts to cause an employer to discriminate against an employee because of union activity or the lack of

it commits an unfair labor practice—unless a lawful union shop agreement is in effect and the employee lost his status in, or was refused admission to, the union for nonpayment, or nontender of periodic dues and fees.

Obviously the primary intent and effect of Section 8 (b) (2) is to render unenforceable all union security agreements except a particular type and to restrict even its enforcement to a limited situation. But the provision has other effects, some of them clearly equitable. For example, in *NLRB v. Star Publishing Company,* 97 F. 2nd 456 (C.C.A. 9th, 1938), a Wagner Act case, the publisher was asked by the Teamsters' Union to force his circulation department employees to leave the American Newspaper Guild, the lawful bargaining agent of their choice, and join the Teamsters. Refusal clearly meant that the Teamsters would refuse to deliver his newspapers, the economic impact on the employer being particularly damaging because of the nature of his business. Compliance with the Teamsters' request meant committing the unfair labor practice of discriminating against his employees in order to discourage membership in one union and encourage it in another. The publisher chose to comply with the Teamsters' demand and thus violated the law. Under Section 8 (b) (2) an employer caught in this kind of trap can reject the demands of the union and, if a strike results, successfully charge it with an unfair labor practice.

REMEDIES

The normal remedy given by the Board in the case of discrimination to encourage or discourage union membership is an order of reinstatement with back pay. This is true even if the employer has subsequently hired a replacement. The Board will not, however, direct back pay if, during the period between discrimination and reinstatement, the plant has been shut down for business reasons, nor will it direct back pay for the period when the employee was voluntarily on strike. Moreover, employees lose their rights to reinstatement with back pay if (1) the strike constituted mutiny; (2) the strike was designed to force the employer to commit an unlawful act; (3) the strike was in breach of a collective bargaining agreement; (4) the strikers engaged in violence or threats of violence, including mass picketing; (5) the strike occurred within sixty days after notice was given by the union that it desired to terminate or

modify an existing collective bargaining agreement; (6) the strike was a sit-down.

Unfair labor practice strikers, that is, employees striking because the employer has committed an unfair labor practice, are entitled to reinstatement after a strike even though the employer has to discharge replacements hired during the strike. However, economic strikers, that is, workers striking for higher wages, shorter hours, or better working conditions, are not entitled to reinstatement at the end of the strike if their jobs have been filled by permanent replacements. However, economic strikers retain their status as "employees" under the Act, which means that the employer cannot refuse to hire them because they went on strike or because they are union men. Moreover, even though an employer can legally refuse to rehire an economic striker who has been permanently replaced, he must be careful that his refusal is based on that fact, not on the fact that the employee is or was engaged in union activity.

UNION SECURITY

There is something unpalatable to the majority of Americans about an arrangement whereby membership in an organization is enforced by making the opportunity to earn a livelihood partially contingent upon it. A fortiori, an agreement which makes membership in a trade-union essential before obtaining employment, i.e., the closed shop, has relatively little popular support outside union circles.

Nonetheless, trade-unionists in their quest for control over the job, have historically sought to obtain some form of institutional security against employer hostility and employee apathy. The lack of class consciousness of the typical American worker (as compared, for example, with the English worker) has created the problem of getting new or apathetic employees into the union and keeping them there. The closed shop is an old device for achieving these objectives. But there are others—the union shop, maintenance of membership, preferential hiring. A well-developed institution of seniority rule is sufficient in the railway industry, where the closed shop is outlawed.

Union security is a natural outgrowth of collective bargaining. At the end of 1946, 4,800,000 workers in the United States were covered by closed or union shop agreements with preferential hiring provisions. Workers under union shop agreements without preferential hiring numbered 2,600,000, while 3,600,000 were under mainten-

ance of membership agreements. Predominant among the industries in which collective bargaining is relatively mature and in which closed shop conditions exist are the building trades, printing, trucking, the maritime industries, coal mining, and clothing manufacture. By and large, with the exception of coal mining and the maritime industries, these have been the organized areas since V-J Day with the highest degree of stability—that is, least number of work stoppages.

That union security should develop hand in hand with collective bargaining and that these areas should be relatively stable is not surprising. Once a union has obtained majority support it cannot be expected to refrain from attempting to get control over all jobs in the bargaining unit. Moreover, since the National Labor Relations Act (both the Wagner Act and the 1947 statute) imposes upon the union with majority support the obligation to bargain collectively for all employees, the union feels that it has a right to the support of all the employees.

In terms of industrial peace as a desideratum, a union working under some form of union security agreement has a most effective disciplinary control over the employees. Consequently, it is in a better position than it would otherwise be to be responsible for the adherence of the employees to the terms of the collective agreement (e.g., a no-strike clause). For example, the International Typographical Union, which is the oldest national union in the United States and has had the closed shop for many years (it has been a law of the international since 1899), on some occasions when a local struck in violation of an agreement, not only repudiated the local but moved in and furnished the employer with employees. In some cases the I.T.U. reimbursed publishers for losses suffered by reason of such strikes. Moreover, responsibility for, and interest in, stability typically comes from institutions which themselves are secure and therefore feel that they have a stake in the status quo. A union which has protective devices to fend off attempts by employers and other unions to undermine its bargaining position and destroy or weaken its status has that kind of security.

The Rules. Union security was specifically excluded from the operation of the Wagner Act. An employer who discriminated against an employee with regard to hire or tenure of employment in order to discourage or encourage union membership violated Section 8 (3) and committed an unfair labor practice. But an employer who

discharged an employee for failure to belong to or maintain good standing in a union which was undominated and unsupported by the employer and had been selected by the employees as their collective bargaining representative was protected by a proviso in the Act, if the collective agreement contained a union security clause (closed shop or otherwise).

Only one type of union security, an agreement which conditions employment upon union membership thirty or more days after the effective date of the agreement or the date of hiring—whichever is later—is excluded from the operation of the Taft-Hartley Act. In addition, the agreement may be executed only with or by a complying union which has received authorization in an election from a majority of the employees eligible to vote, and it may be enforced in only one situation, namely, when the employee has lost or been denied membership for nontender of the periodic dues and initiation fees uniformly required by the union. This means reasonable fees, since Section 8 (b) (5) makes it an unfair labor practice for a union to exact excessive fees. Moreover, not only is an employer who discriminates against an employee in order to discourage or encourage union membership guilty of an unfair labor practice except under the circumstances outlined above, but so is a union or a union agent who causes or attempts to cause the employer to so discriminate.

Either the employer or the union may be held responsible for the illegally discharged employee's back pay depending upon which is responsible, although the employer is liable in the case of a lawful union shop agreement illegally enforced only if he had reasonable grounds for believing that union membership was denied or terminated for reasons other than nontender of periodic dues and fees.

The obvious effect of these provisions is to render all kinds of union security agreements except a particular type unenforceable either by unions or employers. For example, not only closed shop contracts, but also hiring hall agreements which require membership in the union as a condition of registering are illegal. Thus, in *NLRB v. National Maritime Union,* 22 LRRM 1289 (1948), the Board issued a cease and desist order to prohibit use of a hiring hall arrangement in which the employer took all employees from the hall, but only union members could register, nonunion members being permitted in the hall only when no union men were available for employment. These provisions also make unenforceable legal

union shop contracts unless they are obtained by complying unions through the operation of the election machinery (described below). Even then the agreement is unenforeable except in those cases where employees have refused to tender dues and fees. In effect, therefore, all a union can hope to get lawfully under the Taft-Hartley Act is an agreement which gives it a disciplinary weapon helpful in obtaining dues and fees payments. For this reason, the remark that the Taft-Hartley Act knocks out the closed shop but leaves the union shop intact is somewhat misleading.

Union shop elections. Added to the Board's work load by Section 9 (e) (1) is the duty of conducting elections among the employees in a bargaining unit to ascertain whether or not they wish to authorize their bargaining agent to negotiate for the union shop agreement permitted by the statute. The permitted agreement, as explained above, is one which provides that an employee must, as a condition of employment, become and remain a member of the union thirty days or more after hiring or after negotiation of the agreement, whichever is later.

If (1) the union is the bargaining representative of the employees, that is, if it is certified or recognized, (2) no representation question currently exists, (3) a petition alleging that 30 per cent of the employees in the unit desire to give the union authorization is submitted to the appropriate regional director, along with a statement that the union has complied with the three conditions precedent of Section 9 (f), (g), and (h)—registration, financial reports, and non-Communist affidavits—and (4) no referendum on the issue has been held within the previous twelve months, the regional director sends out a member of his staff, usually a field examiner, to investigate. If the regional director dismisses the petition (because the employer's operations do not affect commerce; or a representation question exists; or there is insufficient evidence of 30 per cent authorization), the petitioner may appeal to the Board. As in the case of a petition for a representation election, the Board's decision is final.

If the regional director determines that the petition is well founded or the Board so rules, the parties may utilize the same two informal consent procedures available in representation cases, namely, the consent election agreement, followed by the regional director's determination, or the consent election agreement, followed

by Board determination. The procedures are the same as in representation cases.

If the informal procedures are not used and the regional director determines that the case is an appropriate one for election *without* formal hearing, he may conduct an election by secret ballot and furnish the parties with a tally of the ballots. (This procedure is analogous to the prehearing election in "R" cases under the Wagner Act.) The parties have the opportunity to make appropriate challenges and objections to the conduct of the election, and they have the same rights, and the same procedure is followed, with respect to such objections and challenges, as in representation cases—except that there is no run-off election.

If the preliminary investigation indicates that there are substantial issues which require Board determination *before* an election can be held, the regional director institutes such proceedings by issuing a notice of hearing to the parties. The hearing is conducted by a hearing officer, who is normally a field examiner or attorney out of the regional office. After the hearing, the record is forwarded to the Board, along with an analysis, but no recommendations. The parties may file briefs and also request oral argument before the Board. Normally, however, it will not be granted. After review of the case, the Board makes its decision, which is either to dismiss the petition or to direct that an election be held.

The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as in the case of consent representation elections followed by a Board certification.

Only if a majority of all employees in the unit *eligible to vote* (not a majority of those voting) vote to give the union authority may the union proceed to bargain with the employer for the permitted union security agreement. See Section 8 (a) (3) (ii). For example, in a unit composed of 1,000 employees, 700 of whom voted, authorization to the union by 450 of those voters (a clear majority by the standards applied to political elections), would be insufficient. At least 501 employees would have to vote affirmatively in order to give the union the desired authorization.

It should be emphasized that no election can be conducted until the representation question—if any—is resolved. This means that the Board cannot clear up both the representation and the union security issues in one election.

Assuming that the employees authorize the union to bargain for the union shop and that such an agreement is consummated, its duration is uncertain. Section 9 (e) (2) orders the NLRB to conduct, upon receipt of a petition filed by an employee or group of employees on behalf of 30 per cent or more of the workers in a bargaining unit and alleging that they desire to rescind the authority previously granted, an election on that issue. Actually, of course, the petition is filed with the appropriate regional director, and he orders an investigation as a preliminary to the election. The same procedure is followed after receipt of a petition asking for rescission as is followed after receipt of a petition asking for authority. The parties have the same rights, the same disability, that is, there must have been no election on the point within the previous twelve months, and the same opportunity exists to utilize the two kinds of consent agreements described above.

If a collective agreement of not more than two years' duration, which contains a lawful union shop, is in effect at the time that a petition for a rescission referendum is requested, it seems clear that the NLRB, following its rules *in re* existing contracts as a bar to representation elections, will dismiss the petition. Thus a petition for a union shop referendum called for after such an agreement had run fourteen months would be denied.

Since a majority of all employees eligible to vote, rather than a majority of those voting, must favor the union shop, it is arithmetically possible for a minority of the employees to cause the termination of a legal union shop agreement. The rescission referendum is in fact an election in which the union asks for a vote of confidence. Thus, if in a unit of 100 eligible voters, forty-one of the employees vote against continuation of the union shop while forty-nine of them vote to affirm the authority previously granted, the agreement will be terminated because the ten abstaining voters have, by virtue of their abstention, in effect cast "no" votes.

It is interesting to note that, while the union must comply with three conditions precedent, must satisfactorily meet the representation question, must get 30 per cent of the employees to sign a petition, must obtain a majority of all employees eligible to vote, and must then bargain its demand through the employer in order to obtain a union shop, conceivably a minority of the employees may—by signing a petition and voting—destroy the agreement. This is an illustration of the emergence of individual rights as against collec-

tive rights, but the former are determinative only in destroying union security. To put this more clearly—while the wishes of the employees is the *only* factor considered in destroying union security, it is *only* one factor considered in establishing union security. One may wonder why the union and the employer have an interest in the matter in one case and not in the other. Some labor students, among them Professor (now Senator) Paul Douglas, have suggested that neither the union nor the employer should have an interest in either case. The argument is that the wishes of the employees should be the only factor considered in determining whether or not a closed shop (or any of the numerous variants) should be established. Thus the union security issue would be resolved as the representation question is now resolved, that is, by a vote of the employees.

Despite the fact that the employer does not have to agree to a union shop simply because the employees authorize it in an election, such a vote puts him under an important psychological disadvantage at the bargaining table. He is faced with the fact that most of his employees want the union shop, and thus has lost what is often his best argument against granting it. Under these circumstances he probably will be disposed to agree to it. Consequently, it may be that the referendum will, as a practical matter, be the final determinant in most cases.

The union shop has been authorized in all but a relatively few of the elections held. At the end of September, 1948, 27,377 elections had been held and the union shop had been authorized in all but 632 (about 2 per cent) of them. Generally speaking, 87 per cent of the employees eligible to vote did vote, about 94 per cent of the votes cast being pro-union shop. The total cost of conducting union-shop referenda during this thirteen-month period has been estimated at slightly less than one million dollars.

These results do not square with the argument, advanced by the sponsors of the Taft-Hartley Act, that restrictions on union security are necessary because the typical American worker is opposed to any form of compulsory union membership. The figures must, however, be discounted to some extent because in many instances they were at least as much of a demonstration of group solidarity against employer pressures as they were a demonstration of sentiment favoring the union shop.

Dual unionism. The restrictions on the execution and enforceability of union security agreements have many important effects.

One of the most important, and most precise, is the impact on cases which involve a discharge for "dual unionism." The issue of a discharge for "dual unionism" arose under the Wagner Act when a collective agreement establishing union security was in existence and certain employees, disgruntled with the kind of representation they were getting, campaigned for another union to succeed the current collective bargaining representative (hence the name "dual unionism"). After these workers had been expelled by the union for their acts of "disloyalty" and had subsequently been discharged by the employer pursuant to the union security agreement, the employees or the campaigning unon complained to an NLRB regional director of a discriminatory discharge. Generally, the Board, reasoning that—in order to preserve stability in the collective bargaining relationship—an employee who had been committed to representation by one union (through application of the majority principle in an election) ought to be bound for a reasonable period of time, refused to hold that such discharges were discriminatory, that is, designed to encourage or discourage union membership. In cases arising near the end of the life of the agreement, however, the Board, recognizing that an employee ought to have some power to challenge a union's right to continue as bargaining representative, found such a discharge to be discriminatory and ordered the employer to reinstate the employee with back pay—if the employer knew that the incumbent union's motive was to get rid of adherents to a rival union.

By the application of these rules, the employer-union bargaining relationship was protected by holding employees to their election choices for a reasonable period of time, just as political voters are held to their election choices for a given period of time. But a union which was doing a job of representation unsatisfactorily to its constituents was estopped from perpetuating itself in office.

The difficulty with the old rules, which was the fault of the statute, not the Board, was that only employers were ordered to make restitution in the form of back pay. This was obviously unfair, since the employer in many of these cases was not in any realistic sense responsible for the discharge. He either complied with the union's request or faced a paralyzing strike. The Taft-Hartley Act corrects this inequity, permitting the employer to refuse to discharge an employee who has lost his union membership because of "dual unionism" (making it, in fact, unlawful for him to discharge for

that reason). And if the union retaliates with a strike, it has committed an unfair labor practice.

The chief quarrel with the new rules is that they give only minor recognition to the desirability of protecting the stability of an existing collective bargaining relationship. They are designed to permit any employee to shift allegiance and campaign for another union *at any time*. Both the union and the employer, although both may object to the electioneering, are estopped from prohibiting it without risking charges of an unfair labor practice.

An official change of collective bargaining representative cannot occur more than once a year, and therefore the "dual unionism" of the employees cannot nominally affect the status of the parties to the relationship (the employer and the union) until at least one year has elapsed (and in the case where a collective agreement is in existence perhaps not for two years). However, there is something anomalous in charging a union with the responsibility for delivering on its promises in the collective agreement (discussed at greater length below in connection with Section 301, which makes breach of the collective agreement a cause of action) while destroying one of its most effective disciplinary weapons for seeing that those promises are carried out.

The union not only has lost a good deal of its power to stop employees from freeing themselves from its control as long as they tender dues and fees, but it may not be able to procure their discharge for incompetence, wildcat strikes, unauthorized slowdowns, Communism, or anything else other than nontender of dues or fees.

Of course, the employer can discharge for cause (which a wildcat strike might be) without committing an unfair labor practice, but weakening the union's authority over its members (and therefore its status) is hardly the way to make it a "responsible" party to the collective bargaining process. You do not normally make a group reliable by promulgating rules based on the assumption that it is unreliable. Sharply curtailing the use of a union's disciplinary controls over its members, without reference to whether or not there is good cause for their use, is a rule based on such an assumption. Certainly wildcat striking and labor espionage are as good reasons for a union's disciplining a member as nonpayment of dues.

The right to work. The anti–closed-shop provisions of the Taft-Hartley Act are the federal implementation of the "right to work"

notion which has produced prohibitive or regulatory statutes and constitutional amendments against union security agreements in at least twenty-one states, including Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. Thirteen of these states have statutes or amendments which render unlawful all forms of union security, and Section 14 (b) of the Taft-Hartley Act takes cognizance of states' rights by providing that nothing in the federal law shall authorize the execution of agreements that make union membership a condition of employment in any state or territory where such agreements are prohibited by state or territorial law.

In other words, an employer and a union in an industry affecting commerce but located in a state like North Carolina which outlaws all forms of union security are estopped from enforcing even the particular union shop agreement permitted by the Taft-Hartley Act. Moreover, the NLRB will not conduct a union shop election in such a state.

The "right to work" is a slogan that is more attractive than it is substantial. No one has the right to work in any realistic sense—that is, in the sense that someone has a duty to give him a job. At best he has only the expectancy of working if employment is available and he can sell his services to the hiring agent, frequently—unless there is a strong union—on the latter's terms.

The basic question is not one of freedom or right, but one of power—power over hiring, tenure, and the terms of the employment contract. Statutes which, by outlawing or restricting union security, purport to free individual workers from the power of unions in so doing tend to leave them subject to the power of employers. In terms of freedom of employees, it is at least doubtful that they have more freedom when their job status is controlled solely by employers than when it is controlled solely by unions or by employers and unions jointly. The doubt is even greater if the union is a democratic one in which the members have a real voice.

Anti–closed-shop statutes can only be interpreted as a reversion to individual bargaining. Few people will seriously suggest that an individual worker has any freedom of contract or any bargaining strength in the all to frequent situation of job scarcity. In fact, not even the drafters of the Taft-Hartley Act so suggested.

It must also not be forgotten that the closed shop is not an institution peculiar to trade-unions. Analogous institutions are permitted to exist and function effectively in our economy. There are numerous examples of organizations other than labor unions which make membership a condition of pursuing a livelihood. The state which has an integrated bar for lawyers (e.g., Washington, where membership in the state bar association is a condition of law practice) affords one example. The American Medical Association, while it is not in a position to make membership a condition of practicing medicine, does, by controlling hospital facilities and utilizing other devices, effectively regulate much of the medical practice.

These organizations defend themselves on the grounds that they are engaged in protecting the public by enforcing high standards of professional practice. But there is nothing very detrimental to the public about the lawyer who advertises; it is largely detrimental to other lawyers. And there is nothing detrimental to the public about the doctor who participates in health cooperatives; it is only detrimental to other doctors. Certain unions like the Screen Writers' Guild or the American Newspaper Guild can argue just as effectively that they, too, should have a high degree of control so that they can protect the public by enforcing high standards of journalism and script writing — important matters in a country which is proud of its instruments of mass communication.

Abuses of the closed shop. Unions have used closed shop agreements as instruments of abuse. They have sometimes adopted discriminatory and even exclusionary admission policies. Moreover, there are sufficient examples of unions operated undemocratically to justify some criticism that power over workers has—through the growth of unionism—only been shifted from one group of bosses to another, with little or no industrial democracy in fact.

The problem of the discriminatory refusal by a union which has a union security agreement to admit certain employees to membership, thus causing them to lose their jobs or to be refused employment, has frequently arisen. Negroes, members of other minority groups, and employees who have campaigned for a union which lost an election have been among those refused admission. The NLRB was generally powerless under the Wagner Act to handle the cases involving minority groups and equally impotent in the case where the winning union excluded campaigners for the loser, unless the

employer in signing the agreement with the winning union (which he had favored) knew—and hoped—that it would exclude the campaigners for the losing union. The Board found an employer who discriminated in this kind of situation guilty of an unfair labor practice. *Wallace Corporation v. NLRB,* 323 U.S. 248 (1944).

The Board also indicated that it has "grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. . . . If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of Section 8 (3) of the Act of such a contract would be open to serious question." *Bethlehem-Alameda Shipyard, Inc.,* 53 NLRB 999, 1016 (1943). These remarks, if converted from dictum into ruling, would be in line with the Railway Labor Act decisions holding that a union which is the exclusive bargaining agent for firemen cannot, in negotiating terms and conditions of employment, discriminate against Negro firemen, even though they are ineligible for union membership.

The problem needs some solution. The Taft-Hartley Act gives a partial solution (open, of course, to the criticism of unduly limiting a union's internal disciplinary power) by making it unlawful for even the labor organization with the permitted union shop agreement to prevent the employment of, for example, a Negro, by denying him admission to the union on purely discriminatory grounds. The union can keep a Negro out (see Section 8 (b) (1)), but it cannot deprive him of employment for that reason. (But the employer is free, in the absence of a state fair employment practices act, to refuse to hire or to discharge a Negro solely on the basis of his race, as long as his action is not based on the absence—or presence—of union membership.)

Sound legislation aimed at the closed union and the undemocratic union is not as simple as it might seem at first blush. A union which closes its doors usually does so because of the fear of unemployment or the fear of decreased wage rates because the labor

market is flooded. While this position may be short-sighted, it is, nevertheless, the product of normal human motivation—as evidenced by the restrictive activities of other economic groups, notably those of businessmen. Keeping new workers out of the market in order to hold the price of labor up is not far removed from the lawful practice of a businessman who buys 212 war surplus tractor engines, retains twelve of them as tractor engines, and sells 200 of them as junk, being careful to drill holes in the 200 which are disposed of in order to protect the price of the twelve retained. And it is not dissimilar to the practice of some fruitgrowers' associations of burning oranges to keep the price up.

At the root of the matter is either the problem of economic security or the quest for maximum profits, and until we are prepared as a matter of national policy to strike at such restrictive practices universally, it seems inequitable to single out unions for special treatment.

The undemocratic union is theoretically indefensible, but the correct therapeutic is to get at the abuses rather than to weaken or destroy an institution (union security) which not only is often free of abuses but frequently is a useful device for maintaining stability. Against the desire to exalt individual rights in the union is the hard fact that the leaders of the organization must retain some control over the members if they are to function effectively as collective bargainers.

Moreover, large corporations are not run democratically in any realistic sense. Charles Wilson of General Motors is in a position to guarantee the adherence of the corporation to the collective agreement, without worrying too much about individual stockholder approval, and Walter Reuther of the United Automobile Workers (C.I.O.), if he is to be a "responsible" bargainer, must have some assurance that membership support of the agreement can be obtained and maintained.

The objective is to ensure that the individual union members have some democratic controls over their leadership without at the same time destroying the effectiveness of that leadership. Or, to put this another way, the objective is to have unions which are institutionally strong but in which the ultimate source of power and control is the membership.

The Taft-Hartley Act appears to be designed, not to promote individual worker freedom by ensuring to them democratic rights

within the institutional framework of strong unions, but to promote individual worker freedom simply by weakening unions institution ally (which is another way of saying that workers are "freer" when they are less under the control of unions and more under the control of employers—a conclusion that is very hard to support with data).

A 1947 amendment to the Massachusetts State Labor Relations Act is a more intelligent approach to the problem than the Taft-Hartley Act because it strikes at the abuses rather than at the institution. That law forbids an employer to discharge or otherwise discriminate against an employee for nonmembership in a labor union having a union security agreement with the employer, unless the labor union certifies that the employee was deprived of membership as a result of a bona fide occupational disqualification or the administration of discipline. The act sets up a procedure whereby the employee can appeal to the State Labor Relations Commission for a determination of whether or not his suspension, expulsion, or exclusion from the union was lawful. Expulsion is unlawful under the statute if (1) imposed by the union in violation of its constitution and by-laws, or (2) imposed without a fair trial, including an adequate hearing, or (3) imposed when the offense committed by the employee did not warrant expulsion. Refusal to admit to full membership is unlawful if it is based on race, creed, color, or sex.

Impact on collective bargaining. All union security agreements entered into before June 23, 1947, and all agreements of *not more than one year* entered into between June 23 and August 22, 1947, remained in effect until their extension or renewal. As a consequence, the major impact of the restrictions was not felt until the middle of 1948. But such experience as there has been makes it clear that their impact on labor relations has not been good—a result predicted by Professor Edwin Witte in the spring of 1947. The closed shop industries have not been, with the exception of coal mining and the waterfront, major strike sources, particularly since V-J Day. In only three of the twenty-nine major strikes of 1946 was union security even an issue, and in those three strikes it was only one of the issues. Thus it was predictable that outlawing the closed shop not only would probably serve to stir up trouble in industrial areas that had been relatively free of it, but also that work stoppages in the areas that had been plagued by them would not be prevented.

The most serious work stoppage directly attributable to the new statute during its first year of operation involved the Interna-

tional Typographical Union and the newspaper and job printing industry, which, as explained above, has worked under the closed shop for several decades with a high degree of stability, relatively few strikes, and benefits to both employers and employees.

The prolonged 1948 work stoppage on the Pacific Coast waterfront turned largely around the same issue, the union insisting upon maintenance of its hiring hall with a union-controlled dispatcher, the employer agreeing to the former but demanding a joint administered system of dispatching.

There is a well-founded suspicion that large numbers of "bootleg" union security agreements were entered into during 1948, particularly in those industrial areas where union security is a well-established institution and the employer has no real quarrel with the arrangement.

The issue of an unfair labor practice of this type, committed either by the employer, the union, or both, does not typically arise except in two situations: (1) the union attempts to procure the discharge or stop the employment of an employee because of his nonmembership, and the employer files a charge with the Board; or (2) the employer discharges or refuses to hire the employee because of his nonmembership, and the employee or some other labor union files a charge with the Board. The majority of charges may be expected to come from illegally discharged employees, but even they may be reluctant to come before the Board for the reason that the remedy—reinstatement with back pay—is not likely to be very meaningful. For example, a nonunion coal miner who obtains an order of reinstatement normally does not profit very much, since in order to obtain full benefit from the order he has to go back onto the job with union employees, who cannot be expected to make his job situation very pleasant.

For these reasons, "bootleg" unwritten agreements or mere understandings between the union and the employer may exist unchallenged, with the employer attempting to protect himself by alleging discharge or refusal to hire "for cause" and the union being immune because of lack of proof.

The most common device for circumventing the operation of the restrictions is an agreement containing a clause whereby the employer promises to prefer applicants for jobs who have previously been employed or who are adjudged competent, and the union promises to furnish to the employer applicants who have been pre-

viously employed, with due regard for competency and dependability. Frequenty the employer and the union jointly pass on the matter of competency.

For example, Harry Lundeberg of the Sailors Union of the Pacific obtained an agreement containing a clause (reputedly written for him by Senator Taft) whereby the employers promise to prefer applicants for jobs who have previously been employed on company ships, and the union promises to furnish to the employers applicants who have been previously employed, with due regard for competency and dependability. If seamen with prior experience are not available, graduates of the Andrew Furuseth Training School are to be preferred.

This kind of agreement means that if the union has had control over jobs and over the apprenticeship system, it will generally maintain that control. While union membership is not nominally a condition of employment—a fact which makes the agreement immune from direct attack—one can be sure that most workers in such situations will continue to be union men. The job of proving that the refusal to hire a nonunion man was discriminatory, with part of the complaint being based on the existence of this kind of agreement, is a formidable one, particularly since the Board's order must rest on a preponderance of evidence and also because Section 8 (c) excludes expressions of opinions or views as evidence of motive, unless such expressions contain threats or promises.

Constitutionality. The constitutionality of the limitations on union security is subject to challenge on the ground that they interfere with freedom of contract. When the Florida "open-shop" constitutional amendment was contested in *A.F.L. v. Watson,* 327 U.S. 582 (1946), two of the arguments were (1) that the amendment deprives unions and employers of freedom of contract in violation of the due process clause of the Fourteenth Amendment and (2) that it violates the contract clause of the Constitution—no state shall pass a law impairing the obligation of contracts. The United States Supreme Court held for Watson (the Florida Attorney General) on the ground that this amendment had not yet been interpreted by the state court, which might conceivably construe it in a constitutional manner.

The constitutional argument against the federal statute is based largely on the due process clause of the Fifth Amendment, which relates to congressional action. In light of decisions on such

statutes as the Fair Labor Standards Act, which makes it unlawful to negotiate a wage contract to pay less than forty cents an hour (which is just as much an interference with freedom of contract as the antiunion security provisions of the Taft-Hartley Act), Sections 8 (a) (3) and 8 (b) (2) probably will survive the test.

Recent court decisions have sustained the constitutionality of state "open shop" laws. For example, the Arizona Supreme Court upheld the constitutionality of the "Right to Work" Amendment to the Arizona Constitution, which reads: "No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization." A state statute provides for injunctive relief and suits for damages for violation of the Amendment and also declares contracts prohibited by it to be illegal and void. *American Federation of Labor v. American Sash & Door Co.,* 189 P. 2nd 912 (1948). The North Carolina Supreme Court reached the same result. Subsequently, the United States Supreme Court reviewed the two cases and affirmed the conclusions of the state courts.

REFUSING TO BARGAIN COLLECTIVELY

Under the Wagner Act employers had the duty to bargain collectively with the union that represented the majority of their employees. Section 8 (a) (5) of the Taft-Hartley Act reimposes this obligation on employers, and Section 8 (b) (3)—marking one of the major changes in federal labor policy—places the same obligation on unions.

Since achieving status as the bargaining representative and engaging in negotiations with the employer is a primary objective of most labor organizations, it may seem somewhat anomalous to impose such a duty on unions. Yet there have been a few instances in which unions have refused to bargain. For example, in the salutary case of the *Times Publishing Company,* 72 NLRB 676 (1947), the Board held under the Wagner Act that the International Typographical Union had refused to bargain in good faith. Hence it could not successfully charge the employer with a refusal to bargain because the issue of his good faith could not be tested. This ruling had the

effect of making the union's refusal to bargain collectively an unlawful act, with the sanction being denial of a right under the Wagner Act.

But the decision was an administrative holding (and necessarily a negative one). The section of the Taft-Hartley Act making a union's refusal to bargain collectively an unfair labor practice, with the sanction being a Board order, is entirely defensible. If collective bargaining is to be our national labor policy, there is no reason why both parties should not have the legal duty to carry it out. Admittedly effective collective bargaining is essentially a private matter and cannot be automatically achieved by legislative fiat, and obviously much of the resistance to the process has come from employers. But these do not seem to be sufficient reasons for imposing the duty on one party and not on the other, particularly when instances of union refusals to bargain have occurred.

Collective bargaining is defined by Section 8 (d) to mean (1) meeting at reasonable times, (2) conferring *in good faith* with respect to (a) wages, hours, and conditions of employment, (b) negotiation of an agreement, and (c) questions arising under an agreement, and (3) execution of a written contract incorporating the agreement reached, if requested by the other party. The section also contains the proviso that neither party is compelled to agree to a proposal or to make a concession.

This is substantially a codification of the meaning of the phrase "collective bargaining," as worked out by the Board under the Wagner Act. It means, among other things, that employers who refuse to bargain because the employees are on strike, or who by-pass the union and bargain with the individual employees, or who refuse, after an agreement has been reached, to reduce it to writing, or who decline to negotiate with the union on merit increases, pension plans, and group health and accident insurance plans commit unfair labor practices. Moreover, it means that a union, which attempts unilaterally to impose certain conditions such as a closed shop, taking the position that they are nonbargainable issues, commits an unfair labor practice.

Two important statutory changes are made, however.

In the first place, under Section 9 (a) individual employees or groups can now present grievances to the employer and get them adjusted, without the intervention of the union which is the collective bargaining representative, if (1) the adjustment is not in-

consistent with the collective agreement then in effect and (2) the union has had an opportunity to be present at the adjustment. This is an important alteration. The NLRB held under the Wagner Act that, although individual employees are entitled themselves to *present* grievances to their employer, the union which is the exclusive bargaining agent has the right to be present and *negotiate* them. *Hughes Tool Co.*, 56 NLRB 981 (1944), modified and enforced, 147 F. 2nd 69 (C.C.A. 5th, 1945).[3]

The difficulty with this change on its face is its failure to recognize the interest the union, which is the exclusive bargaining agent, has in the day-by-day interpretation and application of contract terms, a process which is involved in the settlement of grievances. One of the questions, for example, which will arise is: Do precedents worked out by the employer and his individual employees bind the union in its grievance processing?

In the second place, a precise procedure for a certain kind of collective bargaining—to wit, bargaining over an agreement which one party wants to amend or terminate—is established. The general purpose of the procedure is to insure, every time an agreement is renegotiated, that the parties bargain for at least sixty days without a work stoppage.

For an example of the application of this procedure, take an agreement which has a definite expiration date, with an automatic renewal clause in the absence of advance notice by either party of a desire to terminate or modify. The employer (or the union) must give notice of the desire to terminate or modify sixty days before the expiration date. The party desiring termination or modification must offer to meet and confer with the other party. If no agreement is reached in thirty days, that party must notify the Federal Mediation and Conciliation Service and the state mediation service, if any, of the existence of a dispute. The party must also continue the contract in full force and effect, without resort to strike or lockout, for a period of at least sixty days after the notice is given.

Neither party has, however, the duty to discuss modification of an agreement if it is to become effective before the agreement can by its own terms be properly reopened.

[3] But the Supreme Court has held, in a case arising under the Railway Labor Act, that individual employees with a grievance are not bound by a settlement negotiated by the union in a proceeding to which they were not personally made parties, unless they clearly authorized, or assented to, settlement by the union in their behalf. Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945).

Violation of any of these duties by either party is an unfair labor practice. Moreover, any employee who engages in a strike during the sixty-day period loses his status as an employee under the statute. It seems likely, although not yet certain, that this penalty is imposed on employees in cases where the employer's unfair labor practice caused the strike. Clearly the penalty is imposed on economic strikers who otherwise would be entitled to reinstatement at the end of the strike, if they had not been replaced, and who in any case would retain their status as employees as a protection against discriminating in rehiring.

Professor Archibald Cox has pointed out another important effect:

> Unless the union happens to retain the support of a majority of the nonstrikers, the employer is excused from continuing the bargaining which ordinarily offers the best hope of terminating a strike; and, so far as the strikers are concerned, he may employ labor spies, discriminate against union men, and engage in other acts of interference and coercion aimed at destroying the union. This would convert the contest into a struggle for group survival and increase the bitterness and strife.[4]

If the notice is given less than sixty days before the expiration date (say forty-five days), it is still a refusal to bargain collectively for the party to strike or lockout until sixty days after notice have elapsed—even though the agreement itself expired forty-five days after notice was given.

If the agreement is one which contains no specific expiration date but can be reopened by notice, the same procedure must be followed before a strike or lockout can lawfully be conducted.

Since most unions and employers bargain sixty or more days before resorting to self-help, it seems unlikely that this cooling-off period will have any significant effect in reducing work stoppages, although it may encourage employers and unions to engage in pre-negotiation conferences prior to adversary bargaining and hence work in that direction.

UNFAIR LABOR PRACTICES COMMITTED ONLY BY EMPLOYERS

INTERFERENCE, SUPPORT, OR DOMINATION OF A UNION

Section 8 (a) (2), in another carry-over from the Wagner Act, makes it an unfair labor practice for an employer to dominate or

[4] Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 HARVARD LAW REVIEW 1, 281 (1947).

interfere with the formation or administration of a labor union or to contribute support to it. However, the section does not prohibit an employer from permitting employees to confer with him during working hours without loss of time or pay.

Substantively, Section 8 (a) (2) is unchanged from the Wagner Act unfair labor practice on the same point. Thus, for example, an employer violates the law if he does any of the folowing: contributes financial support to a company union and urges his employees to join it; solicits or permits his supervisors to solicit memberships in a labor organization—whether "inside" or "outside"; requests employees to sign cards showing their interest in forming a company union; or causes petitions for a union to be circulated in the plant.

The sole change in the law here lies in the area of remedies. The Wagner Act Board, when it had a case in which the employer had solicited memberships among his employees for a local affiliated with a national or international union and had then recognized the union as bargaining representative—a case of company assistance in violation of the law—ordered the employer to cease and desist from interfering and to terminate his recognition of the union. The Board framed complaints in these cases under Section 8 (1) rather than 8 (2) and held employers guilty of interference with their employees' right to select bargaining representatives of their own choosing rather than guilty of support or domination. The affiliated union, after conditions permitting a free choice by the employees had been established, could participate in representation elections and could be legally recognized as the bargaining agent.

However, when the Board had a case of employer support or domination of a local *not affiliated* with a national or international union, it not only entered a cease and desist order and an order to terminate recognition, but it also ordered the local union disestablished, that is, the employer had to withdraw all recognition and support, and the union was permanently barred from participating in elections or acting as the employees' bargaining agent. This discrimination between affiliated and unaffiliated unions, which was based on the notion that an affiliated union is much more likely to remain free of employer interference after such interference has been ordered to cease than an "independent" union, is prohibited by Section 10 (c) of the Taft-Hartley Act. The Board can continue to order disestablishment, but it cannot discriminate on the above basis in so ordering.

Accordingly, the NLRB now orders disestablishment whenever it finds that the employer has "dominated" the union, regardless of whether the union is affiliated or unaffiliated. However, when the Board finds that the employer has "supported" and/or "interfered," but has not "dominated," it only orders that the employer withhold recognition from the union until certification—again without reference to whether or not the union is affiliated.

DISCRIMINATION AGAINST EMPLOYEES FOR USING THE NLRB

The last unfair labor practice for employers is to discriminate against an employee for filing a charge with the Board or giving testimony under the Act. See Section 8 (a) (4). Since this provision sets out the least important of the five employer unfair labor practices and makes no change from the Wagner Act, it needs no extended explanation or comment. The scope of the prohibition is indicated by *In re Poe Manufacturing Company,* 27 NLRB 207 (1940), in which an employer who refused to reinstate an employee who had filed charges under the Act was found guilty, even though the employer thought that the charges were false.

UNFAIR LABOR PRACTICES COMMITTED ONLY BY UNIONS

RESTRAINING OR COERCING EMPLOYERS

In addition to imposing the duty on unions not to restrain or coerce employees, Section 8 (b) (1) of the Taft-Hartley Act makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his representative for the purpose of collective bargaining or grievance adjustment.

Thus a union or its agents cannot, without violating the law, coerce an employer into joining or resigning from an employer association, or dictate who shall represent an employer in the settlement of employee grievances, e. g., compel the removal of a personnel director who has been designated to perform this function.

REQUIRING EXCESSIVE MEMBERSHIP FEES

As pointed out above, a union violates Section 8 (b) (5) if it requires of employees covered by a lawful union shop agreement the payment, as a condition precedent to joining the union, of an excessive or discriminatory fee.

In ordering to determine whether or not a fee is in fact excessive, the Board is directed by the Act to consider the practices and customs of labor organizations in the particular industry and the

wages currently paid to the employees affected. Peculiarly enough, the Board is advised in Section 4 (a) that it is not authorized to appoint any persons for the purpose of making economic analysis.

The purpose of Section 8 (b) (5) is clear and generally justifiable, but its lack of significance is indicated by the fact that as of August 22, 1948, there had been no litigation on the point.

FEATHERBEDDING

Taking a cue from the Lea Act, the anti-featherbedding statute aimed at James Petrillo and the American Federation of Musicians, Section 8 (b) (6) prohibits a union from causing or attempting to cause an employer to deliver value or agree to deliver value, *in the nature of an exaction,* for services either not performed or not to be performed.

The Lea Act, which is somewhat broader than Section 8 (b) (6), makes it a crime to use express or implied threats of force, violence, duress, *or other means* to compel or attempt to compel a radio station to employ persons in excess of the number of employees needed by the radio station to perform actual services. In a test case, *United States v. Petrillo,* 67 Sup. Ct. 1538 (1947), in which the American Federation of Musicians tried to force a Chicago radio station to employ three men who were allegedly not needed to perform actual services by directing all A. F. M. members in Chicago to cease working for the station and by picketing in front of the station, the statute was held to be constitutional on its face. In the subsequent retrial, Petrillo was found not guilty because of failure to prove his intent to compel the station to hire more men than needed.

One of the obvious substantive difficulties with a rather broad anti-featherbedding statute like the Lea Act is the extraordinary difficulty of ascertaining how many employees are needed to perform particular functions in particular industries. Employers will have one figure, unions another, and the courts will have the job of determining the exact number of men required to perform all kinds of jobs in hundreds of different industries.

Section 8 (b) (6) avoids this difficulty by aiming only at union demands to get payments for which no work at all is to be done (with the result, of course, that its scope is limited). Thus union objections to the introduction of labor-saving machinery or insistences upon make-work devices are not in themselves unfair

labor practices. For example, the demand by the International Typographical Union for retention of the working rule requiring a publisher to reproduce in his own shop matrices procured from other composing rooms is not unlawful.

On its face Section 8 (b) (6) appears broad enough to prohibit union attempts to get vacation pay, severance pay, rest-period pay, and pay for check-in and waiting time. But congressional reports and debates indicate that the section is not to be construed that broadly. This position is substantiated by the inclusion of the words, "in the nature of an exaction." In fact, the Board trial examiners have applied Section 8 (b) (6) to only a narrow segment of the practices typically labeled as "featherbedding." They have, as indicated above, restricted their rulings of illegality to union demands for payment to persons for work which is not done at all.

In principle there is no objection to an anti-featherbedding statute. Featherbedding not only tends to increase labor costs, but it also reduces productivity and hence is inconsistent with long-run public interest. However, an anti-featherbedding statute is a negative approach to at least one problem which requires a positive answer. The root cause of many make-work activities is the fear of economic insecurity, frequently provoked by technological change, i.e., the introduction of labor-saving machinery. It seems harsh to penalize a man, or group of men, for attempting to protect himself or themselves against even a short-run loss of employment due to a technological change without offering any feasible alternative. As has been pointed out by Professor Charles Gregory, the problem created by technological change is not capable of solution by the application of legal sanctions. It is an acute and difficult social and economic problem which ought to be met by some kind of plan offering unemployment compensation during the period of displacement, establishing retraining facilities, and providing for more information and more extensive employment services (e.g., the United States Employment Service). Presumably society benefits from technological changes by receiving more and better products at lower prices. Accordingly (at least insofar as this presumption is well founded) society should assume the burden of paying for such benefits by financing the program rather than leave the short-run cost on the shoulders of displaced wage earners and their families.

The problem of technological displacement may also be met to some extent by welfare fund provisions written into collective bargaining agreements. But the Taft-Hartley Act, as explained below, imposes restrictions on the execution and enforcement of such plans.

It should also be pointed out that featherbedding is not an activity peculiar to organized labor. A union that demands wages for work not done is attempting to protect, or perhaps to increase, the income of its members. A corporation that resists technological change, buys up patents and suppresses them, or restricts production in order to maximize profits has the same motives, and the conduct has the same impact on the economy.

ILLEGAL STRIKES AND BOYCOTTS

Shifting sharply from the policies of the Wagner Act, which imposed no restrictions on the use of economic weapons by trade-unions, the Taft-Hartley Act prohibits their use in several situations. Section 8 (b) (4), characterized by rather complicated language and phraseology, limits the use of two specific types of union self-help: the strike and the boycott. Section 501 (2) defines a strike to include any concerted stoppage of work, any concerted slowdown, or other concerted interruption of operations by employees. The United Mine Workers "No contract—no work" rule is included by the parenthetical observation that a strike includes a stoppage of work "by reason of the expiration of a collective-bargaining agreement." Section 8 (b) (4) defines a boycott as engaging in or inducing employees to engage in a concerted refusal *in the course of their employment* to use, transport, manufacture, process, or otherwise handle or work on any goods or commodities or to perform any services. This is a rather narrow definition of the term, since it includes the refusal of workers to handle "hot cargo" but excludes their refusal to purchase it. The use of the phrase, "in the course of their employment," compels this construction.

However, the union or union agent who induces employees to engage in a strike or boycott has not committed an unfair labor practice simply because the activity fits the statutory definition of one or both of the two terms. Strikes or boycotts are not unlawful unless they are designed to accomplish one of the illegal objectives set out in Section 8 (b) (4). This does not mean that the *primary*

objective of the strike or boycott must be illegal; an unfair labor practice is established if *one of the objectives* is illegal.

FORCING AN EMPLOYER TO JOIN AN ASSOCIATION

A union or union agent who induces employees to strike or boycott in order to force an employer or self-employed person to join a union or an employer association has violated the first part of Section 8 (b) (4) (A). Thus if a union strikes (1) to force an employer to become a member of an association set up for multi-employer or industry-wide bargaining or (2) to force a plumbing contractor who does all or part of his own work to join a labor organization, it has committed an unfair labor practice. This provision of the Taft-Hartley Act is all that remains of the National Association of Manufacturers' suggestion that industry-wide or multi-employer bargaining be banned or severely restricted. Representative Hartley received the suggestion warmly, but its substance was compromised away as the bill moved through the legislative process.

In addition to subjecting itself to charges of an unfair labor practice, a union that violates this provision is subject to a lawsuit for damages under Section 303 (a) (1).

FORCING ONE EMPLOYER TO CEASE DOING BUSINESS WITH ANOTHER (SECONDARY BOYCOTT)

Employers who pay union wages are generally (assuming that nonunion wage scales are lower) at a disadvantage if they must compete in the products market with employers who pay nonunion wages. Either the union wage scale has to be reduced, or the employer has to find ways to offset the disadvantage of his higher labor costs, or the nonunion plants have to be organized. Historically, trade-unions have fought perhaps their hardest legal battles in attempting to persuade courts that their legitimate economic interests extend throughout the entire industry in which they are organized. A situation duplicated many times is the one in which the union is organized in several plants in an industry and finds it necessary, in order to protect its wage and hour standards in the organized plants, to exert economic pressures against the unorganized plants which have, because of lower labor costs, a competitive advantage in the products market.

The Norris-LaGuardia Act gave recognition to this broad concept of economic interest as justifying the intentional infliction

of harm by making it clear that a union is involved in a labor dispute and thus immunized from the federal injunction if it is organized in the industry in which the dispute occurred, even though it has no members in the particular plant against which it is directing economic pressure. Some states and some state courts followed this lead. And the Wagner Act was not to be construed "so as to interfere with or impede or diminish in any way the right to strike."

As already indicated, the Taft-Hartley Act shifts sharply from this policy. Nowhere is the shift made clearer than in the second part of Section 8 (b) (4) (A) which makes it an unfair labor practice for a union to induce or encourage the employees of any employer to engage in a strike or a boycott in order to force any employer or other person to cease handling, using, or dealing in the products of another person or doing business with him. (The union that engages in a secondary boycott is also subject to a lawsuit for damages under Section 303 (a) (1).)

The prohibition is aimed at, among others, the following kind of situation: The Teamsters have a labor dispute with the Pabst Brewing Company; they induce the Bartenders Union either to call a strike or to induce their members not to handle Pabst beer, the objective being to force the tavern owners to cease doing business with the Pabst Brewing Company. Both unions have committed an unfair labor practice.

Consumer aspects of a boycott pressure are not, because of the phrase "in the course of their employment," prohibited. Thus it is an unfair labor practice for the United Brotherhood of Carpenters and Joiners to induce carpenters in New Orleans to refuse to handle prefabricated housing materials, the objective being to force contractors to stop dealing with the manufacturers of such materials. But it is not an unfair labor practice for the Carpenters Union to picket a clothing merchant who has hired a nonunion contractor to build his house, in order to induce his customers to cease buying clothing from him, the ultimate objective being to coerce the clothing merchant into hiring a union contractor. However, if other employees respect the picket line in the course of their employment, the activity will become an unfair labor practice.

Respecting a picket line is specifically given protection in one limited situation by a proviso of Section 8 (b) (4). Refusing to cross a picket line is not an unfair labor practice in this kind of

case: Union A is certified by the NLRB (or it has the support of a majority of the employees and is recognized by the employer, i.e., there is no representation question); the members of Union A conduct an authorized, not a "wildcat," strike against the plant. Any neutral (e.g., a consumer, a disinterested member of the public, or a union employee who doesn't work in the struck plant) can respect that picket line with impunity—even though the picketing or the striking from which it stems has an unlawful objective.

However, if the picketing has an unlawful objective, Union A is liable for an unfair labor practice and any union which has employees in the plant and directs them to refuse to cross the line may get involved in the case (on the grounds that they, too, are striking or refusing to perform services in the course of their employment).

If the union is not certified or recognized or the strike is unauthorized, unions that induce their members to respect the picket line—if by respecting it they are refusing in the course of their employment to handle goods or perform services—may similarly become involved.

FORCING AN EMPLOYER OTHER THAN THEIR OWN TO RECOGNIZE AN UNCERTIFIED UNION

Section 8 (b) (4) (B) makes it an unfair labor practice for a labor union to induce or encourage the employees of any employer to engage in a strike or boycott where an object is to force any *other* employer to recognize or bargain with a union that has not been certified as the employees' collective bargaining representative, and Section 303 (a) (2) makes the same conduct grounds for a lawsuit.

This provision does not make unlawful the strike to gain recognition as the bargaining agent. For example, it is lawful for Union X to induce its employee-members to strike to force their employer to recognize Union X as the bargaining representative. (Inasmuch as procedures are available for the peaceful resolution of recognition and representation questions, a good theoretical case for making unlawful the use of self-help to solve such problems can be made. The case breaks down, however, because determined employer opposition, plus the slowness of the procedure, can result in the destruction of the position of the union before the Board gets around to settling the question.) However, if Union

X has no employee-members in the plant, but does have members in competing plants, and—in order to protect the union wage scale in the competing plants—it puts a peaceful picket line around the nonunion plant, it may have committed an unfair labor practice. If other union members, e.g., the Teamsters, respect that picket line, Union X will have induced them to refuse to perform services in the course of their employment in order to force an employer (who is not their own because they have no members employed there) to recognize or bargain with it.

This provision arguably, therefore, hits at "stranger" picketing and revitalizes a test of legality which reached its height in *Duplex Printing Press Company v. Deering*, 254 U.S. 443 (1921), and its nadir in the Norris-LaGuardia Act, namely: Are the pickets and the picketed employer in a proximate employer-employee relationship? The Norris-LaGuardia Act makes "stranger" picketing nonenjoinable by a federal court if the picketing union has employee-members in the industry in which the dispute arose. A labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Clearly Section 8 (b) (4) (B) makes unlawful the union technique of refusing to handle goods in order to force the employees of the producer of those goods to join the union and thus compel the producer to recognize the union as the bargaining agent.

FORCING AN EMPLOYER TO VIOLATE A CERTIFICATION

Consistent with the policy of promoting both the establishment and maintenance of collective bargaining relationships is the rule that those relationships should be protected against assaults by unions as well as by employers. This protection means the imposition of legal restraints on the self-help activities of unions when they are designed to force the destruction of a particular collective bargaining relationship which involves a legitimate union and has been established by reference to the wishes of the employees. The Taft-Hartley Act, unlike the Wagner Act, takes some steps in this direction.

When two or more unions presented representation claims under the Wagner Act and one of them was certified or accorded Board recognition at the regional level, the employer had the legal duty to bargain with it. Yet if the union that lost in the rep-

resentation proceeding, even though it had been soundly defeated in an election, decided to strike and/or picket in protest over its loss, it could do so with immunity from the remedy of injunction in a federal court (the effective federal remedy) because of the Norris-LaGuardia Act. (However, state courts operating under "baby" Norris-LaGuardia Acts were generally intolerant of picketing by a minority union in this situation. For example, see *Swenson v. Seattle Central Labor Council,* 27 Wash. 2nd 193 (1947).)

If the minority union was a powerful one or could get support from other unions, the employer was placed in an intolerable situation. For example, if the striking union was the Teamsters or the Teamsters respected the picket line (as in the *Swenson* case), the employer either had to commit an unfair labor practice or reconcile himself to going out of business.

The NLRB held that the striking employees had committed an unlawful act in this type of situation and consequently had lost any rights to reinstatement or back pay, but this ruling was insufficient to protect the employer from a powerful union.

The inequity is corrected in part by Section 8 (b) (4) (C) which makes it an unfair labor practice for a union to induce or encourage the employees of any employer to engage in a strike or a boycott where an object is to force any employer to recognize or bargain with one union when another union has been certified. Moreover, the union may be sued for damages under Section 303 (a) (3).

In addition the injured employer is given an opportunity to obtain reasonably expeditious preliminary injunctive relief by Section 10 (l), irrespective of the limitations of the Norris-LaGuardia Act. Whenever a labor organization is charged with a violation of Section 8 (b) (4) (C) (or any of the other provisions of Section 8 (b) (4) thus far discussed), the preliminary investigation is to be made "forthwith and given priority over all other cases except cases of a like character." In addition, whenever the NLRB officer to whom the matter has been referred has "reasonable cause to believe" that a complaint should be issued, he *must,* on behalf of the Board, petition the appropriate federal district court for injunctive relief pending final adjudication by the Board. The court has jurisdiction to grant such relief as it deems "just and proper," notwithstanding any other provision of law, which means, of course, that the Norris-LaGuardia Act is not applicable as a bar.

JURISDICTIONAL WORK DISPUTES

Under the Taft-Hartley Act the NLRB has the onerous job of resolving the classic jurisdictional dispute, i.e., a fight between two or more unions over who is to have control of certain work. The other kind of jurisdictional dispute, treated elsewhere in the statute, is the quarrel between two or more unions over who is to have control of certain workers, i.e., who is to be their collective bargaining representative.

The latter type of dispute is resolved by resort to the well-established procedure of elections, and by terms of the Taft-Hartley Act, as pointed out above, a union that strikes or boycotts in order to force an employer to disregard a certification resulting from such an election is subject both to charges of an unfair labor practice and to a suit brought by the injured party or parties in a federal district court. Sections 8 (b) (4) (C) and 303 (a) (3).

The former type of dispute—the work dispute—is now also resolved by the Board. Section 8 (b) (4) (D) restrains a union from inducing or encouraging employees to engage in a strike or boycott in order to force an empoyer to assign particular work to the employees of one union rather than to the employees of another union, unless the employer is failing to comply with a Board order on the matter.

For example, suppose that the United Brotherhood of Carpenters and Joiners strikes a plant because the employer has awarded the disputed work of dismantling certain machinery to the International Association of Machinists. Not only is the Carpenters Union subject to charges of an unfair labor practice, but it is also liable to a damage suit. See Sections 8 (b) (4) (D) and 303 (a) (4). If the employer files charges with a regional director and he thinks they are well founded, the Board is charged with the duty to hear and determine the dispute—unless the Machinists and Carpenters themselves adjust it or agree upon methods for adjustment within ten days after the charge has been filed and notice of hearing has been served. If the unions make a voluntary adjustment, the charges of an unfair labor practice are dropped. If they do not, the hearing is held at the regional level and ultimately a Board order certifying the union entitled to jurisdiction is issued. If the parties comply with the certification, the unfair labor practice charge is dismissed, although this does not free the union from liability for damages in a federal court. If they do not comply, a complaint and a notice of

hearing are issued, and a full-blown unfair labor practice case is initiated. See Section 10 (k). Although the union which loses on the jurisdictional issue cannot get a review of that ruling by a direct court appeal or by a collateral attack, it can assert error in the certification as a defense to the alleged unfair labor practice and thus ultimately get a court review on the point.

The argument supporting these provisions *in re* work disputes is that the double liability imposed upon labor organizations serves as a deterrent and the disputing labor unions have an additional motive, i.e., avoiding litigation, for making a voluntary adjustment.

Whether or not this provision of the statute will actually deter unions from concerted activity as a consequence of a jurisdictional work dispute is a matter of conjecture. Legal sanctions, negative in form, do not always influence human conduct in the intended manner. Clearly, long-standing work disputes, with the sides sharply drawn for deep-seated economic reasons, e.g., technological displacement, will not be entirely obviated merely by punishing the parties to the dispute for their self-help activities. The use of the traditional economic weapons (the strike and the boycott) may be prevented, but the dispute itself will not—and cannot—be resoved by punitive sanctions. In the last analysis the disputing unions—assuming that they are deterred to some extent—will choose either to employ economic weapons more subtle than the strike and/or the boycott or resort to some orderly procedure for the resolution of the dispute. The hope is that these provisions will cause unions to choose the latter of the two alternatives.

There is some reason to doubt that this hope will be fully realized. The statute punishes the unions, not for having a dispute, but for doing something about it (striking or boycotting, or inducing the same, in order to force an employer "to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization"). There is about as much reason for thinking that the unions will do something about such a dispute as the one described above (between the Carpenters and the Machinists) that the statute does not prohibit or that the enforcers of the law cannot detect or prove as there is reason for thinking that they will resort to peaceful settlement. There will be no agreement to a peaceful, voluntary adjustment unless both parties want such an adjustment. In cases like the illustration one of

the parties, since it already has control over the disputed work, has no reason to seek adjustment.

Moreover, in all cases where the union has engaged in prohibited activity because of a work dispute and has consequently been charged with an unfair labor practice, the incentive for making a voluntary adjustment within ten days is weakened by the fact that the union cannot thereby free itself from liability in court. And again such settlement is probably out of the question unless there is some reason why the other union also wants it.

One of the defects in this section of the statute is the fact that no provision is established for the resolution of a jurisdictional work dispute until some kind of self-help technique is utilized by one of the unions. There is no procedure for resolving the matter before resorting to a strike or a boycott.

However, despite these doubts and this defect, the provisions have produced at least one hopeful result. An agreement—the impetus for which was furnished by the General Counsel—establishing a peaceful procedure for deciding jurisdictional work disputes has been consummated in the building trades. The arrangement calls for a National Joint Board, composed of an impartial chairman, two representatives from labor and two from management, to make binding decisions in these disputes. The procedure has the advantage of providing for settlement by experts in the industry rather than by an already overburdened governmental agency, and it envisages settlement before, rather than after, a work stoppage.

If voluntary adjustments or procedures for voluntary adjustments are not worked out, many unions will then elect either to skirt the law by employing subtle economic weapons or to violate it and throw the job of deciding the matter onto the Board.

The Board's task of acting as a compulsory arbiter in this type of situation is difficult and points up a second defect, namely, the absence in the statute of standards by reference to which the Board can make its decision.

There are no statutory rules of the game to guide either the NLRB or the parties. Therefore, the Board has to make its own rules as it goes along and then decide the cases on the basis of the rules it makes. This is not only a case of an administrative tribunal acting as both legislator and judge, but it is also a curious result to discover in a statute which elsewhere attacks the Board's combination of functions— the functions of prosecution and adjudication.

It is even more curious in light of the fact that the reformers of the NLRB, who attacked it for making law, here have ordered it to do that very thing.

As a practical matter, the law which the Board makes in this area is important. Since the charges of an unfair labor practice against a union are dropped if the union complies with the Board's determination of the dispute, the Board must always in these cases determine the jurisdictional question before deciding the unfair labor practice question. To put this another way, the question of whether or not a union is guilty of an unfair labor practice necessarily depends upon a prior determination of which union should have control of the work. Since the Board has to legislate in order to determine this latter question (having no standards for such determinations), the constitutionality of the section making strikes or boycotts for jurisdictional reasons an unfair labor practice is subject to some doubt.

However, it seems probable that the procedure will survive an attack on its constitutionality because, although the Board makes law, it makes it in the "dog," or common law,[5] sense, rather than in the legislative sense. Moreover, the Board's procedure for answering representation questions has not been successfully attacked, and the Board has decided the issue of the appropriate bargaining unit without any very clear statutory standards for guidance.

Analytically, an administrative decision determining the size of a bargaining unit, followed by an election and a certification, is not dissimilar to an administrative determination of which union or craft has jurisdiction over certain work tasks. The former gives the union authority to represent certain workers and necessarily carries with it control over the work they do.

The tough cases are those in which well-established craft unions are arguing solely over work, not workers, the question being not which union will represent the workers now doing the job, but which workers will do those jobs. This was the issue in the dispute between the Machinists and the Carpenters outlined above.

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[5] "It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."—Jeremy Bentham, *Works*, Vol. 5, p. 235 (1843).

The work dispute is, then, analogous to the representation dispute, particularly in those cases where the issue of which union is to control the work is hopelessly intermeshed with the issue of which union is to represent the workers. This kind of case frequently arises, and the NLRB takes cognizance of the fact by stating in its rules that one of the voluntary methods for adjustment which will be satisfactory within the ten-day probationary period is an agreement to follow the proceedings of Section 9 (c), which deals with elections to determine the collective bargaining representative. While an election is an impracticable way to resolve a dispute like the one between the Machinists and the Carpenters, it is useful in a case where a C.I.O. union is moving in on an A.F.L. union (or *vice versa*) in an effort to gain control of both work and workers.

Extremely difficult questions are likely to arise in jurisdictional work disputes involving noncomplying unions. If the Board declines to resolve such a dispute because one or both of the disputing labor organizations are noncompliers, it will deprive the employer (whom the provision is primarily designed to protect) of his remedy. In the case of the fight beween two craft unions strictly over work, there seems to be no reason why the Board cannot make a determination even though the unions are noncompliers. A decision will not necessarily carry with it any legal recognition of the union as a bargaining agent.

However, in the case of the fight between two unions over work and workers, the Board cannot resolve the matter without extending legal recognition as a bargaining agent to one of the unions—a status denied to a noncomplying union by the terms of the statute. If one of the unions has complied and the other has not, the Board can decide to resolve the dispute in favor of the complying union—irrespective of other factors. However, basing determinations solely on compliance with the statute, without reference to historical and economic factors, is not likely to promote industrial peace.

CHANGES IN THE NORRIS-LAGUARDIA ACT

In all unfair labor practice cases the General Counsel has the *power,* after a complaint has been issued, to petition a federal district court for a temporary injunction against the defendent, pending final adjudication of the matter by the Board. See Section 10 (j). However, in all unfair labor practices arising under Section 8 (b) (4), except the jurisdictional work dispute, the General Counsel or

his regional agent has the *duty* to give the case priority and to seek injunctive relief. In these instances the regional director is not supposed to wait until the complaint has been issued. He must petition for temporary relief if, on the basis of the investigator's report, he has reasonable cause to believe that a complaint should issue. See Section 10 (1). In dealing with the jurisdictional work dispute, the regional director has the *power* to petition for temporary injunctive relief following the procedures applicable to the four priority union unfair labor practices of Section 8 (b) (4) *if he believes that such relief is appropriate.*

By the terms of Section 10 (h) the federal courts are specifically given jurisdiction to grant such decrees (that is, the Norris-LaGuardia Act, the federal anti-injunction law, does not apply). However, a court can issue no such temporary injunction without notice to the defendant, unless it is an instance of a mandatory injunction petition which alleges that substantial and irreparable injury will result to the employer if it is not granted immediately. If the petition contains these magic words, a temporary restraining order of five days duration can be issued without notice. Generally, the federal courts grant injunctive relief when the regional director makes out a *prima facie* case, that is, establishes a "reasonable probability" that the charges of an unfair labor practice are true.

This section makes significant changes in the application of federal anti-injunction law, which previously estopped a federal court from issuing temporary orders in a case arising out of a labor dispute to prohibit persons from striking, picketing, or causing striking or picketing—regardless of objective, legality, or identity of the party petitioning for relief (although the case of *United States v. United Mine Workers of America,* 67 Sup. Ct. 677 (1947), established the right of the federal government as an employer to obtain temporary relief to restrain its employees from striking and the duty of the respondent union either to obey a void but nonfrivolous order or risk citation and conviction for criminal contempt).

Moreover, not only were persons who engaged in, or caused, peaceful picketing and striking in a case arising out of a labor dispute completely immunized from the federal injunction under the Norris-LaGuardia Act; but persons engaging in clearly unlawful conduct, e.g., violence, arising out of a labor dispute were also immunized from the federal injunction unless the following procedural requirements were met: witnesses in open court, subject to

cross-examination, testified in support of the complaint, and the court after having heard contrary testimony, found as a matter of fact that (1) unlawful acts (fraud or violence) had been threatened or committed; (2) substantial and irreparable injury would result from the acts; (3) greater injury would result to the complainant if the petition were denied than to the defendant if the petition were granted; (4) the complainant had no adequate remedy at law, e.g., damages; and (5) local enforcement officers were either unwilling or unable to protect the complainant's property.

In addition, a federal court under the Norris-LaGuardia Act could not issue a temporary restraining order of five days duration without notice to the other party—even though the petition contained the assertion that the acts were unlawful and that the complainant's property would suffer substantial and irreparable injury unless such order was so granted—unless there was sufficient testimony under oath to establish *prima facie* the five findings of fact listed above.

Under the Taft-Hartley Act these procedural safeguards of the Norris-LaGuardia Act are waived when the General Counsel—acting through his agent, the regional director—petitions a federal court for a temporary injunction or a temporary restraining order. They are also inapplicable under Section 208 (b) when the Attorney General asks for such relief on the grounds that a strike will imperil national health or safety, and under Section 302 (e) when he asks for an order on the grounds that an unlawful payment to an employee representative (the restrictions on the check-off of union dues and the establishment of welfare funds discussed below) has been made.

These three exceptions to the Norris-LaGuardia Act apply only in cases where either the General Counsel or the Attorney General —both public agents—is the petitioner. The statute continues to apply fully to an employer who seeks injunctive relief in the federal courts.

As a practical matter, however, in the four instances where the General Counsel *must* seek an injunction, the employer is, theoretically but not practically, almost as well off as he would be if there were no Norris-LaGuardia Act. He is in the position, if his charge is well founded, of having the regional director act as his agent in obtaining an injunction. (In this respect, the employer is better off than he was before the Norris-LaGuardia Act; the government bears

the cost for him.) From the point of view of the unions and the employees whom the Norris-LaGuardia Act was designed to protect, it makes small difference who procures the injunction. However, as a practical matter the lag between the time of filing a charge and the time when injunctive relief is sought is typically greater under Taft-Hartley procedure than it would be if the employer sought his own relief.

The regional director must, of course, seek relief in an appropriate federal court. The appropriate court is one which has jurisdiction. By terms of the Taft-Hartley Act, this means the court (1) in the district where the alleged unfair labor practice occurred or (2) in the district where the defendant resides or transacts business. A union is transacting business or residing in a district if it maintains its principal office there or if its officers are engaged there in promoting the interests of the union members.

PEACEFUL PICKETING AND FREE SPEECH

The Supreme Court of the United States has, in a number of decisions, identified peaceful picketing with free speech. While none of the provisions of the Taft-Hartley Act specifically outlaw peaceful picketing, some of them are construed and applied as having that effect.

The clearest-cut constitutional question arises in connection with secondary labor boycotts and "stranger" picketing.

As pointed out above, trade-unions have historically fought perhaps their hardest legal battles in attempting to persuade courts that their legitimate economic interests extend throughout the entire industry in which they are organized. A situation that has been dupicated many times is the one in which the union is organized in several plants in an industry and finds it necessary, in order to protect its wage and hour standards in the organized plants, to exert coercive economic pressures against the unorganized plants which have, because of lower labor costs, a competitive advantage in the products market.

For example, three of the four principal manufacturers of printing presses are unionized by the Machinists. The nonunion manufacturer is able, because of lower labor costs, to undersell its three unionized competitors. The latter inform the union that they will be forced, in order to protect their competitive position, to cut their wage scales unless the Machinists can organize the nonunion plant.

The Machinists set out to do that job. They are unable, because of employer opposition and/or employee apathy, to obtain any members among the workers in the nonunion plant. They place a picket line around the plant. This is "stranger" picketing, unlawful under the 1947 Act either (1) because it coerces employees in the exercise of their right not to join unions or (2) because other employees respect the picket line and consequently refuse to handle goods or perform services in the course of their employment.

Perhaps the Machinists, recognizing that picketing around the manufacturing establishment is ineffectual, undertake to exert economic pressures against the nonunion plant at more sensitive points. Accordingly, they peacefully picket the business concerns which buy presses from the nonunion company, the picket line having the effect of inducing the employees who install and maintain printing presses for the picketed concerns to refuse to handle or work on nonunion presses. This is a secondary labor boycott, unlawful under the Taft-Hartley Act because it is intended to force one person (the purchaser of nonunion presses) to cease doing business with another person (the manufacturer of nonunion presses).

But the Supreme Court has held that peaceful "stranger" picketing directed against an employer who has no union employees (or an employer who has no employees at all) by a union that has organized some of his competitors is the exercise of free speech and therefore constitutionally immune from a broad injunctive order. For example, in *American Federation of Labor v. Swing,* 312 U.S. 321 (1941), the court said: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." See also *Cafeteria Employees' Union v. Angelos,* 320 U.S. 293 (1943). The court has also held that peaceful picketing directed against a self-employed and nonunion peddler's suppliers and consumers in order to induce them to cease doing business with him (a secondary boycott) is a form of the exercise of free speech, similarly protected by the Fourteenth Amendment. *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl,* 315 U.S. 769 (1942).

Analytically, peaceful picketing which is either secondary or "stranger" in character and is effective in inducing persons not to work, can be said to be unlawful under the Taft-Hartley Act. In

fact, the NLRB has held that a peaceful picket line which induces the employees of a building contractor's suppliers to refuse to deliver materials to the building contractor, an object of the picketing being to force the building contractor to stop doing business with a nonunion manufacturer of prefabricated houses, is unlawful and should be restrained.

Earlier in the same case a federal district court granted preliminary injunctive relief pursuant to the petition of the NLRB against the Carpenters Union which, in order to win the dispute with the manufacturer of prefabricated houses, induced—by peaceful picketing and other devices—the employees of the building contractor to refuse to work, an object of the pressure being to force the contractor to cease doing business with the manufacturer. The injunction restrained inducing or encouraging employees by " 'we do not patronize' lists, picketing, or any other acts or conduct" to refuse in the course of their employment to handle or work on any materials or to perform any service in order to force the contractor to cease doing business with the manufacturer. *Sperry v. United Brotherhood of Carpenters and Joiners,* 21 LRRM 2244 (1948). Similarly, a federal district court in Louisiana issued a temporary injunction at the request of a regional director to restrain the Pacific Coast Marine Firemen, which had a dispute with the owners of certain ships, from peacefully picketing the shipyards repairing those ships in order to force the shipyard owners to cease doing business with the shipowners.

There is some reason to believe that such orders are unconstitutional. The Supreme Court has conceded to a state the power to limit the exercise of peaceful picketing to the industry in which the labor dispute arose by prohibiting picketing which conscripts neutrals who have no relation to either the dispute or the industry. *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe,* 315 U.S. 722 (1942). But this relaxation of the peaceful picketing–free speech doctrine is not applicable to the situations under discussion because they involve, unlike the *Ritter's Cafe* case, picketing in the industry in which the labor dispute exists.

The decision of the California Supreme Court (*Ex Parte Blaney,* 184 P. 2nd 892 (1947)) invalidating the State Hot Cargo and Secondary Boycott Act is also illustrative of the point. The statute outlaws any combination which causes employees to refuse to handle goods or perform services for their employer in order to

force him to refrain from doing business with some other employer. The trial court interpreted this as permitting an injunction prohibiting a union business agent, in an attempt to obtain the closed shop in an upholstery supply company, from causing the employees of the company's suppliers and consumers to cease performing services for those suppliers and consumers in order to induce their employers to stop doing business with the upholstery supply company. Among other things, the injunction restrained the business agent from causing peaceful picket lines to be placed around the establishments of the suppliers and consumers who continued to do business with the supply company. The California Supreme Court not only declared the injunction violative of free speech and hence unconstitutional, but also ruled that the statute is invalid.

The relevant provisions of Section 8 (b) (4) of the Taft-Hartley Act, while not as sweeping as those of the California statute, are certainly subject to broad construction. They are probably saved from being declared unconstitutional on their face by Section 8 (c). This section provides, as pointed out above, that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." However, the NLRB has squarely held that Section 8 (c) does not protect peaceful picketing and "We do not patronize" lists, as well as other peaceful means of inducement and encouragement, in furtherance of the objectives proscribed in Section 8 (b) (4) (A), from being restrained.

If the provisions of 8 (b) (4) do not proscribe peaceful picketing in the secondary and "stranger" situations, what do they proscribe? It seems clear that if they are not construed to prohibit a union from peacefully picketing an employer in order either to force him to unionize his employees or to cease doing business with some other employer, they will not extend to businessmen the protection which the Eightieth Congress intended to extend. And if they are so construed, they may—if the union has an economic interest in the industry in which the peaceful picketing occurs—fall within the ambit of the United States Supreme Court's current doctrines identifying peaceful picketing with free speech.

Of course, as the *Ritter's Cafe* case clearly indicates, the right to picket is not absolute. Moreover, Mr. Justice Douglas in his con-

curring opinion in the *Wohl* case pointed out: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." 315 U.S. 769, 775-76 (1942). However, Mr. Justice Douglas is suggesting that the coercive, as distinguished from the persuasive, aspects of picketing may be regulated; he is not suggesting that picketing can be restrained merely because it is part of a secondary or "stranger" pressure or because its objective is illegal. Section 8 (b) (4) does not aim solely at coercion. It regulates picketing that merely induces or encourages.

Despite this rather formidable body of law identifying peaceful picketing with free speech, the courts of several states have recently handed down decisions restraining peaceful picketing because its objective is unlawful and/or it is a "stranger" pressure. Thus the Washington Supreme Court held picketing to be unlawful because (1) it was directed by a union which had no members employed in the picketed establishment and (2) its objective was to compel employees to join the union against their will, a purpose held to be contrary to the public policy section of the state anti-injunction statute. Tennessee held peaceful picketing unlawful when designed to compel an employer to sign a closed-shop contract in violation of the state anti–closed-shop statute, while Michigan enjoined peaceful picketing intended to force the employer to compel his employees to join the union, an objective held contrary to state law. Pennsylvania reached the same result.

Unfortunately, while the judicial notion that peaceful picketing is free speech has an attractive liberal tint, it is an instrument which makes very difficult the legislative development of a sensible and uniform labor policy. Insofar as it enables unions to protect their standards within a particular industry from destruction, it is consistent with the policies of the anti-injunction statutes. But it is also a doctrine whereby the courts can torpedo portions of the labor relations acts.

It seems clear, for example, that an employer who has the statutory duties to bargain collectively with a certified union and not to discharge members of that union because of their membership ought to be able to carry out those duties without suffering great economic

injury. The Taft-Hartley Act, through Sections 8 (b) (4) (C) and 8 (b) (2), attempts to give him the necessary protection; but if peaceful picketing is merely free speech, the protection is flimsy. A minority union can picket an employer to force him to violate a certification or to discriminate against employees who insist upon remaining members of the certified union with immunity from the effective federal remedy—injunction—even though the picket line puts the employer, because other unions respect it, out of business.

The most hopeful device for preserving the constitutional right to disseminate peacefully the facts of a labor dispute without frustrating the legislative development of an intelligent labor relations policy lies in differentiating between the speech and non-speech aspects of picketing. Thus picketing in a context of violence when it becomes an instrument of force could be proscribed (as it has been); abuses of the patrol process by, for example, picketing in mass or continually making false representations of facts, could be narrowly regulated; and picketing which is not designed to disseminate facts or to state arguments, but is designed to put into effect intra- and interunion machinery to force union members under penalty of discipline to respect the picket line, could be restrained without violating the Constitution. But picketing which involves merely the statement of the union's grievance and an appeal for support both by the general public and by sympathetic workers would be equated with other types of free speech, subject only to traditional limitations if the picketing gives rise to imminent danger of extremely serious evil to society. The practical result of the adoption of this analysis would be that most peaceful picketing could be regulated without contravening the Constitution and the development of a policy toward picketing would largely be left where it belongs, that is, in the hands of the legislatures.

THE RIGHT TO STRIKE

Not only is Section 8 (b) (4) subject to constitutional attack insofar as it abridges the right to picket peacefully, but it is also open to attack on the grounds that it interferes with the right to strike.

There is no doubt but that it does interfere with that right. The question is whether or not such interference violates the Constitution.

The Thirteenth Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist

within the United States. . . ." This amendment means that a worker has the freedom to quit his job without being subject to a judicial or legislative decree forcing him to work (although he may be liable for damages if the quitting constitutes breach of an employment contract). In other words, a man has a constitutional right not to be forced or ordered to work without his consent (with the exception of military conscription in emergencies). Section 502 of the Taft-Hartley Act takes cognizance of the Thirteenth Amendment. It reads: "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor . . . be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of such labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment . . . be deemed a strike under this act."

When the NLRB gets a court decree directed against a striking union, it is in effect ordering men back to work, without reference to whether or not they consent. However, individual workers, even with such an order running against their union, can still quit their jobs. It is true that, in the too frequent situation of job scarcity, saying that an industrial worker has the freedom to quit is somewhat like saying he has the freedom to go hungry. But the fact is that he *can* quit.

The right to quit in concert, not the right to quit individually, is unquestionably the meaningful right in twentieth century industrial life. So important to a free trade-union movement is its existence that it can properly be regarded as a right entitled to the protections of the due process clause. But those protections are not absolute. Indeed, the United States Supreme Court has stated that the Constitution does not confer the absolute right to strike. And the Taft-Hartley Act does not destroy the right to strike; it restricts its exercise in certain situations.

There is little realism in the assumption that wrapping constitutional cellophane around the right to strike will produce economic emancipation for the American worker. And it is extremely unlikely that the Supreme Court will answer in the negative the question: Does Congress have the right to regulate the exercise, at least in some contexts, of the right to strike?

THE STATUTE OF LIMITATIONS

Section 10 (b) limits the General Counsel's powers of issuance. He, or a regional director, cannot issue a complaint based on an unfair labor practice which occurred more than six months prior to the filing of the charges *and* the service of those charges on the defendant. This is in effect a six-months statute of limitations imposed on any party aggrieved by an unfair labor practice. Since an unfair labor practice is a public law matter, this cannot, as in the case of a private law matter, e.g., an ordinary commercial contract, be waived.

EMPHASIS OF THE ACT

Whereas the Wagner Act was rigged in favor of unions, Title I of the Taft-Hartley Act carries the opposite bias. It contains five employer unfair labor practices, but generally its slant is proemployer.

Employers can commit five unfair labor practices. Labor organizations can commit nine or eleven, depending upon whether or not Sections 8 (b) (1) and 8 (b) (4) (A) are considered to contain one or two unfair labor practices each. Four or five union unfair labor practices (depending upon the evaluation of Section 8 (b) (4) (A)) are, as described below, also grounds for a damage suit. No employer unfair labor practice is grounds for a lawsuit. Three or four union unfair labor practices, again depending upon the count of Section 8 (b) (4) (A), carry a number one priority before the NLRB, and the jurisdictional work dispute carries a number two priority. No employer unfair labor practice carries such priorities. Lastly, the Board *must* seek preliminary injunctive relief if there is reasonable cause to believe that a union has violated Section 8 (b) (4) (A), (B), or (C) and that a complaint should be issued. The Board *can, but need not,* seek injunctive relief in the case of the five employer unfair labor practices *after a complaint has been issued.*

In light of the work load of the National Labor Relations Board, a priority is most important. For several years the Board fell behind its docket at a progressive rate. At the end of the fiscal year 1944, 2,602 cases were pending; at the end of 1945, 3,244; at the end of 1946, 4,605. As of August 22, 1947 (when Title I of the Taft-Hartley Act became effective) the Board had a backlog of 3,933 cases awaiting decision. From August 22, 1947, to July 1, 1948, 33,755 cases were filed. This figure means that the NLRB had about

four times as much yearly use as it had under the Wagner Act, and as of July 1, 1948, 12,642 cases were outstanding. These figures included unfair labor practice charges and petitions for both representation and union shop elections, the last-named type of case representing about 70 per cent of the total. The work load fell off considerably after July. This fact, coupled with the increase in efficiency because of a five-man rather than a three-man Board, caused a reduction in the backlog. As of December 31, 1948, 6,110 cases were pending. But the significance of priorities remains high. Administration of the statute is not only complicated by forcing many exceptions to chronological filing and docketing, but cases against employers are invariably shunted aside for the higher priority cases against unions arising under 8 (b) (4).

The statistics concerning injunctive relief are also revealing. During the first fifteen months of the statute's operation, thirty-seven petitions for injunctions were filed, two against an employer and thirty-five against unions. Of the thirty-seven petitions, six (two against an employer and four against a union) were sought at agency discretion. The other thirty-one, all against unions, were sought under the mandatory provisions of the act. Of the two injunctions sought against employers, one was granted. On the other hand, seventeen of the thirty-five injunctions sought against unions were issued (and in three other cases temporary restraining orders were issued). While the statistics do not confirm trade-union fears that the Taft-Hartley Act would result in a return to "government by injunction," they do indicate clearly the one-sided character of the statute.

However, despite the bias of the act, charges against employers are outrunning charges against unions. As of December 1, 1948, 4,136 unfair labor practice charges had been filed against employers as compared with 1,188 against unions. The figure of 4,136 is rather misleading. In many instances parallel charges were filed by different employees against the same employer. Consequently, the figure 4,136 represents a somewhat smaller number of actual cases. Nonetheless, it is fair to say that employers have been charged with over three times as many unfair labor practices as unions. Current figures on the ratio of complaints actually issued against employers as compared with complaints issued against unions are not available.

CHAPTER IV

Summary and Evaluation of Title I of the Taft-Hartley Act

THE DIFFERENCES between the Wagner Act and Title I of the Taft-Hartley Act lie primarily in means and assumption, not in objectives. The amended National Labor Relations Act sets out the same three public policy objectives which were contained in the Wagner Act. The only difference between Section I of the Wagner Act and Section 1 of Title I of the 1947 Act is that the latter recognizes that certain kinds of union, as well as employer, conduct causes labor disputes and industrial unrest which burdens and obstructs commerce to the impairment of the public interest in the free flow of such commerce.

Insofar as Title I of the Taft-Hartley Act strengthens the possibility that these three objectives will be realized, it is in the public interest; insofar as it weakens the possibility that they will be realized, it is against the public interest.

One may, of course, quarrel with the objectives, asserting that their achievement is not in the public interest, but this is primarily a quarrel with collective bargaining as a national labor policy. It is an argument for some other kind of policy, probably either individual bargaining or compulsory arbitration. Since the Eightieth Congress agreed that collective bargaining should be our federal labor policy, and since the notion that we are irrevocably committed to collective bargaining as our policy is the basic assumption of this monograph, it seems advisable to evaluate means, not ends, in this discussion.

ENDS

To summarize, Title I of the Taft-Hartley Act is primarily intended to achieve three public policy objectives:

1. Prevention of depressed wage rates which decrease the purchasing power of wage earners and aggravate business depressions.

2. Encouragement of the stabilization of competitive wage rates and working conditions within and between industries because instability aggravates business depressions.

3. Removal of certain causes of industrial strife (e.g., interferences with the organization of employees, refusals to bargain collectively, attempts to get payment for services which are not performed) because (a) that industrial strife burdens and obstructs commerce and (b) it diminishes the volume of employment and wages which in turn impairs the market for goods in interstate commerce.

MEANS

To achieve objectives 1 and 2, encouragement of collective bargaining is set out as our federal labor policy. The chief task of the National Labor Relations Board is to encourage the practice and procedure of collective bargaining. Operating from certain implied premises (not articulated in the act), the 1947 statute empowers the NLRB to do certain things in order to encourage the practice and procedure of collective bargaining:

1. *Premise*: collective bargaining can achieve the public policy objectives whether or not employees are represented by strong unions. *NLRB task*: to protect employees so that they can join unions and/or designate them as their collective bargaining representatives free from employer or union interference; to protect employees so that they can refuse to join unions and/or designate them as their collective bargaining representatives free from employer or union interference. (All protection is, of course, weakened by the "freedom of speech" provision.)

2. *Premise*: the collective bargaining process envisages labor unions which represent the interests of employees, not of employers. *NLRB task:* to insist that labor organizations free from employer domination or interference are established as collective bargaining agents, but to cease presuming that unions affiliated with national or international labor organizations are less likely to continue to be employer-dominated than independent, one-company unions.

3. *Premise:* the collective bargaining process does not necessitate that labor unions be permitted to protect their institutional life by agreements with employers because collective bargaining is not a continuous process. *NLRB task:* to penalize employers and/or unions that enforce any union security agreements except a special kind of union shop; to punish employers and/or unions that enforce the special kind of union shop unless the union has complied with the registration, financial report, and non-Communist affidavit provisions of the statute, a majority of all employees in the bargain-

ing unit have given their approval, and the employee against whom the agreement is enforced was kept out of or expelled from the union for nontender of dues or fees; to permit employees to return from collective bargaining to individual bargaining through a decertification proceeding.

4. *Premise:* the collective bargaining process envisages labor unions which represent *all* employees in the bargaining unit, but not necessarily exclusively. *NLRB task*: to see that a union which is the bargaining representative represents all employees, but not to recognize the union as the exclusive bargaining representative in all situations, e.g., in the matter of processing grievances.

5. *Premise:* the collective bargaining process requires unions to be responsible for the adherence of the employees whom they represent to the agreement negotiated, but the instruments necessary for carrying out that responsibility should be weakened. *NLRB task:* to limit the existence and enforceability of union security agreements as indicated above and thus weaken union controls over members.

6. *Premise:* the collective bargaining process is being resisted by unions, as well as by employers. *NLRB task:* to prevent employers and unions from resisting the practice of collective bargaining.

7. *Premise:* the collective bargaining process itself is essentially a private matter, but the terms of agreements and the actual achievement of public policy objectives 1 and 2 rest in some cases upon the government as well as upon the private parties. *NLRB task:* to prohibit all union security agreements except one type; to force the parties to adhere to a spelled-out collective bargaining procedure, during sixty days of which they are shorn of their bargaining power. (*Title III - Court task:* to punish criminally employers and unions who agree to certain kinds of check-offs and welfare funds. *Title II - Court task:* to deprive employers and unions of their bargaining power for eighty days in certain situations.)

8. *Premise:* the collective bargaining process is unbalanced unless unions are strong; but unions are too strong. *NLRB task:* to prohibit some kinds of organizational striking and picketing; to prohibit unions organized in an industry from attempting, in some instances, to force a change in working conditions in plants in that industry where they are not organized; to prohibit unions from striking to get jurisdiction over work tasks; to prohibit unions from striking to force an employer to ignore a certification; to weaken union protection against injunctions.

To achieve objective 3, the Taft-Hartley Act empowers the National Labor Relations Board to do two things:

1. *Premise:* orderly procedures must be established for determining which union, if any, is to be the collective bargaining representative of the employees. *NLRB task:* following carefully defined procedures (elections only, not consent cross-checks or recognition agreements) to determine which union, if any, the employees wish to represent them.

2. *Premise:* certain kinds of employer and union conduct have caused labor disputes and industrial unrest and the union conduct has been much more productive of unrest than the employer conduct. *NLRB task:* to proceed against employers who engage in five kinds of unlawful conduct and unions that engage in eleven kinds of unlawful conduct—called unfair labor practices; to give No. 1 priority to four unfair labor practices comitted by unions; to give No. 2 priority to one unfair labor practice committed by unions; to give similar priority to no unfair labor practices committed by employers.

CONCLUSIONS

Granted that the public policy objectives contained both in the Wagner Act and in Title I of the Taft-Hartley Act are in the public interest, the 1947 statute weakens the possibility of their achievement in the following major particulars:

1. It assumes that it is a matter of public indifference whether or not collective bargaining exists in a particular plant or industry.

2. It weakens the power of unions to protect their institutional life against employer hostility and jurisdictional pirating by making attacks on all forms of union security.

3. It fails to protect the exclusiveness of the union's position as the collective bargaining agent.

4. It weakens the power of unions to control the employees for whose adherence to the collective agreement they are responsible, by attacking all forms of union security.

5. It reduces the degree of stability in collective bargaining relationships by weakening the power of both parties (the employer and the union) to protect the relationship against destructive attacks made on it by individual employees or other unions.

6. By setting up three conditions which must be complied with by unions in order to acquire statutory rights it weakens the signifi-

cance of some employer unfair labor practices, weakens—and confuses the status of—bargaining relationships established with noncomplying unions, forces noncomplying unions which in fact represent a majority of employees to gain recognition by striking and picketing rather than by submitting the question to peaceful settlement by election procedures.

7. It makes inroads into the collective bargaining process itself by prohibiting certain contract terms.

8. It prohibits a union in many situations from attempting to extend its organizational jurisdiction, even though such an extension is necessary in order to protect the economic position of the organized employees and their employer.

9. It lays groundwork for policy conflicts in the administration of the statute by creating a double-headed agency; makes proof of unfair labor practices more difficult; replaces expeditious and flexible election procedures with rigid procedures.

10. It gives unions a secondary status before the NLRB, while giving employers a primary status, apparently on the assumption that unions have been chiefly responsible for the failures of collective bargaining in the last twelve years—the result being to impede the performance of the Board's primary function of protecting and extending collective bargaining relationships by channeling its limited resources into other areas.

Title I of the Taft-Hartley Act is consistent with the achievement of the objectives in the following respects:

1. By striking at the closed union and at excessive and discriminatory membership dues and fees it makes it clearer that unions with a strong collective bargaining position must represent *all* employees.

2. By outlawing a union's coercive attempts to force an employer to violate a certification either (a) by refusing to bargain collectively with the certified union or (b) by discriminating against the members of the certified union it places employers in a better position to carry out their statutory duties.

3. By imposing on unions the duty to bargain collectively it protects employers against the adamant "take-it-or leave-it" position taken by some powerful unions.

4. By placing some premium on the filing of financial reports and the registration of facts concerning the internal operations of unions it takes a step toward protecting individual members.

5. By making unlawful work stoppages resulting from jurisdictional work disputes and setting up some machinery to handle those disputes it encourages some craft unions to agree to procedures for the settlement of such matters privately and peaceably.

6. By extending to employers a more extensive right to petition for Board determination of representation questions it removes one of the causes of employer refusals to bargain collectively.

PART II

Other Aspects of the Labor Management Relations Act

CHAPTER I

Private Law

THE RIGHT TO SUE A UNION

IN STATE COURTS

AT COMMON LAW a voluntary, unincorporated association—which includes most unions—cannot sue or be sued in its own name. The funds of the union are the property of the members, not the association, and they cannot be reached except in a suit brought against all the members joined.

Some states still follow this rule. But by statutory provision, an unincorporated union can sue and be sued in the courts of at least eleven states: Alabama, California, Connecticut, Louisiana, Maryland, Michigan, New Jersey, South Carolina, Texas, Vermont, and Virgina. In the courts of at least five states the union funds can be reached by bringing action against the officers and selected members as representatives of the entire membership: New York, Ohio, Rhode Island, Washington, and Wisconsin. In other states suits by or against unions may be brought under statutes making voluntary associations suable if "engaged in business," or by bringing a class suit, or by utilizing some other procedural expedient.

While only about a dozen states still follow the common law rules exempting unions from suits as entities, there is a lack of uniformity in the majority of the states that permit such suits; and some of the procedural devices followed are, in terms of the practical matter of winning the case and collecting damages, inadequate.

The Taft-Hartley Act makes no changes in the rules of state courts governing the capacity of unincorporated trade unions to sue and be sued, but it significantly alters the rules applicable in federal courts.

IN FEDERAL COURTS

By the terms of Rule 17 of the Federal Rules of Civil Procedure a union can sue and be sued in its own name in a federal court for the purpose of enforcing for it or against it a substantive right existing under the Constitution or the laws of the United States. For

example, a union may sue or be sued in its own name for triple damages arising from an action brought under the Sherman Anti-Trust Act.

If, however, a union sues or is sued in federal court, jurisdiction of the court being based on diversity of citizenship rather than on a substantive right existing under the laws of the United States, whether or not that union can sue or be sued as an entity depends upon the law of the state in which the federal court is located. *Busby v. Electric Utilities Employees Union,* 323 U.S. 72 (1944). For example, whether or not a New Jersey corporation can sue the United Brotherhood of Carpenters and Joiners in a federal district court located in Texas for violation of the Texas Anti-Trust Statute depends upon the laws of Texas.

Section 301 (b) of the Taft-Hartley Act states that a labor organization can sue or be sued as an entity and in behalf of the employees whom it represents *in the courts of the United States.* This is a significant change if it means what it is apparently intended to mean—namely, that a union can sue and be sued as an entity in a federal court even though jurisdiction of the court is based on diversity of citizenship and the laws of the state in which the federal court is located do not authorize such a suit. However, one limiting factor is the difficulty of showing diversity. A corporation suing a union in a federal court, jurisdiction based solely on diversity, must be able to show diversity between the corporation and all of the union members—a fact almost impossible to prove if the union is a national or international.

SUING A UNION FOR HAVING COMMITTED AN UNFAIR LABOR PRACTICE

THE SUBSTANTIVE RIGHT

It is now unlawful, *for the purpose of Section 303 of the Taft-Hartley Act* only, for a labor organization to engage in or induce or encourage employees to engage in a strike or a concerted refusal in the course of their employment to use, transport, manufacture, process, or otherwise handle or work on any goods or commodities or to perform any services (in other words, striking or boycotting or inducing either) if an objective is:

1. To force an employer or a self-employed person to join a union or an employer association.

2. To force an employer or any person to cease handling, using, or dealing in the products of another or doing business with him.
3. To force or require an employer, *other than their own,* to recognize or bargain with a union which has not been certified as the employees' collective bargaining representative.
4. To force or require an employer to recognize or bargain with one union when another union has been certified by the NLRB.
5. To force or require an employer to assign particular work to the employees in one union rather than to employees in some other union, unless the employer is failing to comply with an NLRB order or certification naming the bargaining representative of the employees performing the disputed work (in other words, referring as an illustration to the jurisdictional work dispute between the Carpenters and the Machinists described above, the Carpenters would not be liable either before the NLRB or before a court if the employer was failing to comply with an NLRB order making the Carpenters the bargaining representative for the employees dismantling the machinery).

However, an employee can refuse to cross a picket line (can refuse to "enter upon the premises of an employer other than his own . . .") with impunity, if the employees of the plant are engaged in strike action ratified or authorized by a union which the employer is legally obligated to recognize (one which is certified or otherwise entitled to recognition).

Since Section 303 is a verbatim reproduction of the five unfair labor practices for unions contained in Section 8 (b) (4) (discussed above), its inclusion in the statute means double liability for unions in five situations. A labor organization committing such acts is subject not only to an action brought by the General Counsel before the NLRB, but also to an action brought by an employer in a federal district court ("without respect to the amount in controversy") or in any other court (state or territorial) having jurisdiction of the parties. Since the former action is a public law matter and the latter action is a private law matter, there is no reason why one should bar the other.

The words "for the purpose of Section 303 only" mean that private parties are not given any new rights to seek injunctions against unions which cause or engage in the unlawful strikes and boycotts of the section; nor are they given additional rights against unions under the antitrust or any other laws. To put it more specifically, both the Norris-LaGuardia Act and the Sherman Act are left untouched by Section 303.

The coverage of the provision is, however, quite large. According to Section 303 (b), "Whoever shall be injured in his business or property" by an unlawful strike or boycott may bring action. This opens the doors of litigation not only to the employer against whom the illegal action is directed, but also to his customers, suppliers, and others who have contractual or advantageous relations with him. As a consequence, unions will probably be deterred more in the long run by Section 303, which makes the five kinds of conduct causes of action, than by Section 8 (b) (4), which makes the same conduct unfair labor practices. This is true despite the fact that the latter section carries with it the threat of injunction and the former does not.

A court may not be able constitutionally to enforce a broad Board order restraining peaceful picketing unless the picketing causes imminent danger of an extremely serious evil to society. But it can constitutionally order damages paid for injuries resulting from peaceful picketing provided that the substantive harm for which the plaintiff is compensated fits within the traditional categories of civil liability, such as defamation. In short, the constitutional immunity of peaceful picketing (or speech) is neither so broad nor so clear when the action is for damages as it is when the action is for restraint. This fact, coupled with the doubt about the precise meaning of Section 303 and the risk of being sued by "whoever shall be injured in his business or property," makes any kind of conduct which might be held to violate the section a very risky business.

Jurisdiction is limited, however, to acts committed by unions that represent employees in an industry affecting commerce, and liability is limited to the funds of the union.

It is worth pointing out again that the statute expressly empowers employers to sue unions for five different kinds of unfair labor practices, but does not empower unions to sue employers for any kinds of unfair labor practices.

SUING THE UNION IN ITS OWN NAME

If a union in an industry affecting commerce is sued for having committed one of the unfair labor practices which is also grounds for a private lawsuit, it may be sued in a federal district court having jurisdiction of the parties, *without regard to the amount in controversy,* or in any other court (state or territorial) having jurisdiction of the parties. See Section 303 (b).

A federal court has jurisdiction over a union if it is located in the district in which the union maintains its principal office or if it is located in a district in which the authorized officers or agents of the union are representing or acting for its members. Under Section 301 (c) and (d) service of any legal process may be obtained on a labor organization by serving one of its agents or officers.

In general, federal courts have jurisdiction over controversies which involve either a federal question and $3,000 or citizens of different states and $3,000. A federal question includes a controversy which "arises under the Law of the United States." Diversity of citizenship exists when the citizen of one state sues the citizen of another state.

The requirement that the controversy must involve either a federal question or diversity of citizenship before a federal court can assert jurisdiction is set out in the United States Constitution. The requirement that $3,000 must be involved is set out in a statute. Therefore, what Congress did in this section of the Taft-Hartley Act was to extend federal jurisdiction by removing the $3,000 requirement. In so doing it opened the doors of the federal courts to employers involved in controversies involving less than $3,000 who might otherwise have to bring action in a state court which does not permit a suit against a union in its own name.

PROVING THE UNION'S LEGAL RESPONSIBILITY

Even when a court permits a lawsuit against union in its own name, the plaintiff has the practical problem of proving that the union is legally responsible for the acts complained of.

He must establish that a relationship of principal and agent existed between the union and the person or persons who committed the unlawful acts. And in order to do that he must show either that the union authorized the acts in advance of their commission or ratified them after their commission by expressing approval or accepting their benefits without protest.

Historically, both federal and state courts were frequently disposed to find that a union, its officers, and even its members had legally authorized or ratified unlawful acts, although there was no showing that the accused parties had either participated in the unlawful acts, directed their commission, or actually approved them after learning of their commission. These holdings, which frequently made the union and its members responsible for isolated acts of individuals (even agents provocateur who held spurious membership in the union during a strike) were based on the notion that the act of each conspirator is chargeable to all.

In recognition of these historical facts Section 6 was included in both the Norris-LaGuardia Act and the various state "baby" Norris-LaGuardia acts. Section 6 made it clear that the officers and members of a labor organization interested in a labor dispute (and the labor organization itself) could not be held legally responsible for the unlawful acts of individual officers, members, or agents—unless there was clear proof that they had participated in the unlawful acts, actually authorized their commission, or ratified them after actual knowledge of their commission.

Section 6 meant, for example, that federal courts could not, as they did in *Lawlor v. Loewe,* 235 U.S. 522 (1915), assess damages against individual union members who had no actual knowledge that certain union officers were conducting an unlawful boycott simply by saying the fact that the union constitution directed officers to make every effort to organize the trade constituted authorization and the fact that the boycott had been discussed in union meetings and in the union newspaper constituted ratification.

It also meant that courts bound by anti-injunction acts would have to require more proof of ratification than the fact that an employee had remained in the union and continued to pay dues after he heard of the unlawful acts.

The full significance of Section 6 was indicated in the case of *United Brotherhood of Carpenters and Joiners of America v. United States,* 67 Sup. Ct. 775 (1947). The Supreme Court held that, in a criminal prosecution brought under the Sherman Act, a trial judge commits reversible error if he fails to charge the jury that neither the international nor the local union is legally responsible for the unlawful acts of individual officers, members, or agents unless the jurors find clear proof from the evidence that the organizations actually

participated in, actually authorized, or ratified, with actual knowledge, the unlawful acts.

The precise meaning of this decision is, however, not entirely clear. Mr. Justice Reed, speaking for the majority, said that if the collective agreement which violates the Sherman Act is signed by an officer who has been directed to negotiate agreements with employers regarding hours, wages, and working conditions, the union may be found to have authorized the unlawful acts. He added that, if the union knowingly participates in the operation of an illegal agreement after its execution, it may be found to have ratified the unlawful acts. And he made it clear that a union cannot insulate itself from prosecutions under the Sherman Act by promulgating a standing order disavowing authority on the part of its officers to make agreements in violation of the Sherman Act and disclaiming union responsibility for such acts.

But Mr. Justice Frankfurter, dissenting, insisted that the decision means precisely what Mr. Justice Reed said it does not mean. Mr. Justice Frankfurter argued that the ruling means that a union is now free from the responsibility for the acts of its officers and agents for violation of the law unless the union either explicitly authorizes them to violate the law or explicitly approves this action after they have violated it. Not only is a union unlikely to issue such authorization or approval, but it can now, according to Mr. Justice Frankfurter, insulate itself from the Sherman Act simply by promulgating a standing order disavowing authority on the part of its officers to make agreements in violation of the law.

The difference between Justices Reed and Frankfurter is based on a disagreement over the use to which Section 6 should be put. The majority of the Court believes that the section should be used to decide, after a man has been determined to be an agent, whether or not his union is responsible for the specific acts complained of.

Mr. Justice Frankfurter (joined by Chief Justice Vinson and Mr. Justice Burton) believes that the section should be used to determine whether or not the person is an agent. Their position is that if, applying the test of Section 6, a principal-agent relationship is established, the test to be applied to determine whether or not the union is responsible for the specific acts complained of is not Section 6, but the tests applicable to corporations under criminal law: Was the act of the agent done for or on behalf of the corporation and within the scope of his authority? Or was the act one which

the agent assumed to do for the corporation while performing duties actually delegated to him?

Regardless of court construction, it is clear that Congress intended that Section 6 of the Norris-LaGuardia Act should not be applicable to any cases arising under the Taft-Hartley Act, whether unfair labor practices or suits for damages.

Section 301 (b) reads that any labor organization in an industry affecting commerce shall be bound by the acts of its agents. Section 301 (e) states that, in determining whether or not a person is acting as an "agent" of a union so as to make that union legally responsible for his acts, the question of whether or not his specific acts were actually authorized or ratified shall not be controlling. (It should be remembered that Section 2 (13), discussed above in connection with employer and union unfair labor practices, also contains this language and has the same impact on union liability for unfair labor practices as Section 301 (e) has on union liability for damages in private lawsuits.)

Accordingly, Section 6 of the Norris-LaGuardia Act is negated for all purposes in cases arising under the Taft-Hartley Act. Thus it is arguable that an agent provocateur or a picket-line captain may be held to be a legal agent of the union by following the theory of the cases prior to the passage of the Norris-LaGuardia Act. And in determining whether or not the union is legally responsible for the "agent's" unlawful acts, presumably courts will follow the test applicable to corporations rather than the test of Section 6. That is to say, the tests will be: Was the act of the agent done for or on behalf of the union and within the scope of his actual or apparent authority? Was the act one which the agent assumed to do for the union while performing duties actually delegated to him?

There is no doubt that the 1947 statute substantially broadens the scope of trade-union liability in industries affecting commerce, and it may increase the vicarious liability of unions beyond that imposed on other economic organizations because of the doubt as to who are union "agents."

PROVING THE UNION MEMBERS' RESPONSIBILITY

At first blush, Section 301 (b) appears to immunize individual union members from the assessment of money judgments such as those that were levied in *Lawlor v. Loewe,* when 197 union members were ordered to pay damages of $240,000. It reads that "any money

judgment against a labor organization (in a federal district court) . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

This clearly means that, when the action is brought *against a labor organization,* a money judgment cannot be levied against its members, but can be levied only against the union. But it does not mean that, when the action is brought *against the members and officers of a labor organization,* a money judgment cannot be levied against those members.

However, the danger to individual union members, at least insofar as the Taft-Hartley Act is concerned, is largely academic.

Section 301 (e) negates actual authorization or ratification as the controlling test for determining when one person is acting as the "agent" of another person so as to make the latter legally responsible. But it limits the negation of Section 6 of the Norris-LaGuardia Act to actions brought under Section 301. Section 301 deals with lawsuits brought against labor unions; it says nothing about lawsuits brought against the members of labor unions.

Presumably, therefore, while Section 6 is no longer applicable for determining the liability of unions, it is still applicable for determining the liability of union members. And even if the authorization and ratification notions of cases like *Lawlor v. Loewe* are resurrected against unions, there is little or no likelihood that they will be resurrected against union members.

For example, an employer sues a union and all its officers and members for damages resulting from a strike conducted by some officers and members in violation of a collective bargaining agreement. While the court, having determined the identity of the union "agents," will follow the tests applied to corporations in order to determine whether or not the union is liable for the unlawful acts, it will follow Section 6 of the Norris-LaGuardia Act in order to determine whether or not all of the members are liable for those acts. And Section 6, as the *Carpenters* case indicates, is adequate protection.

SUING A UNION FOR BREACH OF A COLLECTIVE AGREEMENT

THE SUBSTANTIVE RIGHT

One of the myths of labor law is the notion that collective bargaining agreements have no legal status.

This notion has persisted partly because it was once generally true, partly because it is still true in some states, partly because of diverse treatment in the courts, and partly because of procedural difficulties in suing unions.

A collective bargaining agreement is not like an ordinary commercial contract. It is a multilateral agreement involving an employer (or employers), a union (or unions), and many employees. For a judicial discussion of the nature of collective agreements, see Mr. Justice Jackson's opinion in *J. I. Case Company v. NLRB,* 321 U.S. 332 (1944). In certain respects it lacks consideration and mutuality. For example, by giving a no-strike clause a union promises not to pull men off their jobs; but the typical employer, even if he gives a no-lockout promise in return, does not promise not to take the jobs away from the men. He may for economic reasons close his plant at any time. The collective agreement is frequently not a free bargain in the usual contract sense, but is a bargain made under severe economic duress. It is an agreement which serves to suppress wage competition in a plant or industry, which establishes minimum standards of living for the workers under it, and under which many hundreds, even thousands, of persons must work.

Breach of any kind of private agreement is a matter which is typically governed by state, not federal, substantive law. Since the collective bargaining agreement does not readily fit into contract pigeonholes, even the many state courts that have held it enforceable have been diverse in their treatments. Examples are: (1) the custom and usage theory, which permits the employee to sue for breach of the wage scale in the collective agreement if that wage scale can be considered part of his individual contract of employment; (2) the agency theory, which permits union employees to sue for breach because the union acted as their agent in negotiating the agreement; and (3) the third party beneficiary theory, which permits both employees and unions to sue for breach because the contract was made by the union and the employer for the benefit of the employees.

But collective agreements have been enforced—and against unions, too. Violation of the collective agreement is an unfair labor practice in Wisconsin and Minnesota. Under the California Code collective agreements have the status of other contracts. Written arbitration agreements are enforceable in New York and Washington. See court decisions in Colorado, Georgia, Massachusetts, Mississippi, New Jersey, Ohio, and Texas.

Specific complaint against the federal substantive law (or lack of it) *in re* collective agreements arose partially because of the feeling that the NLRB was, under the Wagner Act, in the business of enforcing them unilaterally, that is, only against employers. The fact of the matter is that breach of a collective bargaining agreement was not under the Wagner Act—and is not now under the Taft-Hartley Act—in itself an unfair labor practice. Under the Wagner Act if an employer discharged an employee for union activities in violation of a provision in the collective agreement, the Board found him guilty of an unfair labor practice. But his guilt rested, not on the agreement, but on the Wagner Act, which made a discriminatory discharge unlawful.

The Board came closer to enforcing collective agreements against employees, holding that employees who strike in violation of a no-strike clause lose any rights to reinstatement.

The Taft-Hartley Act does provide, however, in Section 301 (a) that when a contract between an employer and a union representing employees in an industry affecting commerce is violated, any of the parties may sue or be sued in a federal district court. In short, the act creates, in the language of the Senate Committee Report, the "substantive right" to sue for breach of a collective agreement.

EXTENSION OF FEDERAL COURT JURISDICTION

When a union sues an employer (or vice versa) for having broken a collective bargaining agreement, a set of jurisdictional rules different from those governing damage suits brought against unions for unfair labor practices governs.

The action can be brought in any federal district court having jurisdiction of the parties *without regard to the amount in controversy or without regard to the citizenship of the parties.* Section 301 (a). Again a federal court has jurisdiction over a union if it is located in the district in which the union maintains its principal office or if it is located in a district in which the authorized officers or agents of the union are representing or acting for its members. Service of any legal process may be obtained on a labor organization by serving one of its agents or officers. The section waives not only the statutory money requirement (which is also waived when a union is sued for an unfair labor practice) but also the diversity of citizenship requirement.

The obvious purpose of this extension of federal jurisdiction is to enable all parties to collective agreements in industries affecting commerce to avoid the procedural difficulties of suing in some state courts by giving them ready access to the federal courts.

But questions are likely to arise.

If an employer sues a union (or vice versa) in a federal court for breach, will federal or state substantive law be applied in determining the matter? The Taft-Hartley Act gives both employers and unions the duty to bargain collectively, and it tells them certain things (such as illegal union security clauses) that they should not put in their collective agreements, but it does not establish any affirmative federal substantive law dealing with breach of such agreements. And, as pointed out above, actions for breach of a collective agreement have in the past typically been governed by state, not federal, substantive law—even though the action was brought in a federal court. Therefore, the federal court may decide to resolve the controversy by applying state substantive law.

If the court does apply state substantive law, will the controversy be one which "arises under the Law of the United States"?

If the answer to that question is no, no federal question will exist. And if diversity of citizenship also does not exist, Congress will have extended federal judicial power beyond constitutional limits.

The legislators that drafted the statute apparently recognized that a federal question might not exist in all cases involving breach of a collective agreement. Otherwise, they would not have thought it necessary, in order to open the doors of the federal courts, to waive the diversity of citizenship requirement. Waiving the money requirement would have been sufficient.

THE GENERAL EFFECT

Even in states where breach of a collective agreement is recognized as a cause of action, there has been a paucity of such litigation.

There are several reasons for this.

One is the existence of difficulties in suing unions as entities and in proving their responsibility for specific unlawful acts.

A more important cause is the fact that the parties themselves have been reluctant to call in courts to resolve such disputes. Judges generally do not have the degree of expertness and specialized skill necessary to settle disputes and grievances which turn around the interpretation and application of the agreement. Settlement by re-

sort to the procedures of the agreement or by submission to an impartial umpire or arbitrator skilled in labor relations matters is generally preferable to litigation.

Moreover, while it is one thing for an employer to stand on his rights in, for example, a sales contract, and to sue the offending party, it is quite another thing for an employer to stand on his right to, for example, pay a minimum wage scale in a collective agreement. Standing on legal rights and obtaining a court decree supporting those rights, while it may satisfy the employer's sense of self-righteousness, will not—if the decree is unacceptable to the majority of his workers because the cost of living has risen sharply—produce amicable labor relations or high worker productivity. Conversely, a union which chooses to stand on its right to the payment of a minimum wage scale in a collective agreement and to obtain a court decree supporting that right, will—if the decree is unacceptable to the employer because prices for his product have fallen—probably tend to produce layoffs, short work weeks, and unemployment. In short, rigid adherence to a collective agreement when economic conditions have changed frequently makes for a delusive stability at the expense of good labor relations.

The important fact to remember is that the parties to a collective bargaining agreement, unlike the parties to a sales contract, are involved in a continuous relationship. Since the relationship can be terminated only by cessation of the business enterprise, they must somehow contrive to get along with each other—preferably, of course, in harmony.

In addition, breach of the collective bargaining agreement is not as common an occurrence as is popularly supposed. None of the major strikes which have occurred since V-J Day (with the possible exception of the bituminous coal strike of November, 1946) involved a breach of contract situation. In general, unions and employers endeavor to abide by their agreements. Empirical data simply do not support the general assertion that employers abide by their agreements, but that unions do not (or vice versa).

One is disposed to guess that creating the "substantive right" to sue for breach of a collective agreement will not produce a rush to the courts by sophisticated employers and unions, but will at best only serve to clarify to some extent a somewhat confused area of the law.

SPECIFIC EFFECTS

However, these sections of the Taft-Hartley Act have had an observable impact on the collective bargaining process, chiefly because of the clauses which, as explained above, cancel Section 6 of the Norris-LaGuardia Act as the test for determining when a union is liable for the specific unlawful acts of an "agent." There is a risk, or at least some union negotiators think so, that a union may now, because of this change, be held liable for wildcat or unauthorized strikes, provoked by stewards, organizers, business agents, or even individual members.

Unlike the employer, who assumes many explicit obligations in a collective agreement, the union frequently assumes none. The union may promise not to call a strike during the life of the agreement or perhaps not to strike before resort to the grievance procedure of the agreement. Or it may make a promise to show an interest in worker efficiency, and/or provide competent workers, obligations frequently so vague that enforcement is precluded. But generally the union does not obligate itself to perform many duties for the violation of which a court may invoke legal sanction. Consequently, as a practical matter, a union is most likely to be sued in court for breach of a no-strike promise. If the union negotiators think that the organization may be held guilty of breach when the strike was not actually authorized or ratified by competent and responsible union authority, they will be extremely reluctant to make such promises.

Accordingly, John L. Lewis wrote into the National Bituminous Coal Agreement of 1947 the statement that all provisions of the 1945 contract which contained no-strike clauses were "rescinded, cancelled, abrogated and made null and void." And just to make sure that no court would consider anything in the agreement to constitute a promise not to strike, or a promise to furnish workers, he added that the contract "shall cover the employment of persons employed in the bituminous coal mines covered by this agreement during such time as such persons are *able and willing to work.*"

Other unions have taken the position that they will give no-strike promises in return for management's waiver of its right to sue for breach of the agreement. In the 1947 contract between the Murray Corporation and Local No. 2, U. A. W. (C. I. O.), and the International U. A. W., the union agreed (1) that there will be no slowdown or sitdown strikes during the term of the agreement, (2)

that it will not authorize any striking or picketing with respect to any controversy, dispute, or grievance until the grievance procedure in the agreement has been exhausted (and not even then unless such action has been sanctioned by the International and forty-five days after the filing of the grievance has lapsed), and (3) that it will take immediate steps (as outlined in the agreement) to end any unauthorized stoppages, strikes, intentional slowdowns or suspensions of work. The employer agreed that the U. A. W., its officers, agents, or members will not be liable for damages for unauthorized stoppages, strikes, intentional slowdowns or suspensions of work if the union complies with its obligations under the agreement. In other words, the employer promised not to sue the union for unauthorized strikes or slowdowns if the union takes the promised steps to terminate them.

A similar agreement was reached in negotiations with the International Harvester Company.

In addition to other protective provisions, Lewis inserted a waiver clause in the coal agreement. It reads: "The contracting parties agree that . . . any and all disputes, stoppages, suspensions of work and any and all claims, demands, or actions growing therefrom or involved therein shall be by the contracting parties settled and determined *exclusively* by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry."

Still other unions mutually agreed with employers, not only to stay out of the courts but also to avoid the NLRB. The agreement signed by the C. I. O. United Electrical Radio and Machine Workers and the Victor Division of the Radio Corporation of America reads: "In consideration of this agreement, the Union agrees not to sue the Company, its officers or representatives, and the Company agrees not to sue the Union, its officers, agents or members, for any labor matters, in any court of law or equity, *and neither party will institute any proceeding before any Government administrative board or agency for any act or omission of the other party or its agents or representatives, which occurs during the life of this agreement.*"

This was the kind of clause (including also a promise to resort exclusively to agreement settlement procedures) which the U. A. W. demanded during its August, 1947, negotiations with the Ford

Motor Company. The problem was temporarily solved by appointing a joint labor-management committee to investigate the matter for not more than one year.

Some unions and employers also entered into agreements specifying that the responsibility of either one for the acts of "agents" *will* be controlled by actual authorization or ratification—a specification contrary, of course, to the language of the statute.

Promises not to institute proceedings before the NLRB, while they may in fact serve as deterrents, are clearly unenforceable as a matter of law. Private parties cannot waive public rights.

Promises not to sue are, on the other hand, probably enforceable—particularly if they are coupled with promises to submit disputes to agreement machinery. These promises are waivers of private rights, and—while they deprive courts of jurisdiction—they are analogous to promises to submit future disputes to arbitration, promises which are now enforceable under the laws of several states.

CHAPTER II

Criminal Law

PAYMENTS TO EMPLOYEE REPRESENTATIVES

AN EMPLOYER in an industry affecting commerce commits a crime under Section 302 if he pays or agrees to pay any representative of his employees "any money or other thing of value." The employees' representative (a union or union agent) accepting "any money or other thing of value" so paid or to be paid similarly commits a crime, unless the payment is for:

1. Services rendered by the representative as an employee or former employee—that is, wages
2. The settlement of a court judgment or an arbitration award
3. The settlement or release of a claim
4. The sale or purchase of goods at market prices in the regular course of business

CHECK-OFF OF UNION DUES

Section 302 is intended primarily to impose restrictions on (1) the practice of an employer deducting union dues from his employees' wages and turning the proceeds over to the union—the check-off—and (2) the execution and enforcement of welfare fund agreements. Thus if an employer checks off dues and turns them over to the union, both of them have committed a crime, unless the employee has given to the employer a written assignment irrevocable for not more than one year. To put this another way, if an employer deducts dues from an employee's wages (or agrees to do so) and a union receives such deductions (or agrees to do so) when the employee has not given the employer written permission, both are guilty of a crime.

The National Bituminous Coal Agreement meets these terms of the law in an interesting way. The operators agree to check off the dues, fees and assessments of the employees and to remit the funds to the union—subject, of course, to a written assignment given by each employee to the operators. The union agrees to furnish "with all reasonable dispatch" these written assignments, and

the operators agree to "aid, assist, and co-operate in obtaining" them.

Under these conditions of employer-union co-operation there can be little doubt that the practical impact of this section of the Taft-Hartley Act on the check-off in coal mining is nil. Business will go on as usual, subject only to a little red tape. There is, however, some question of the legality of checking off fees and assessments. The statute permits only "membership dues" to be checked off. But the Department of Justice has indicated that fees and assessments fall within that category and hence that the agreement is legal.

WELFARE FUNDS

Health, unemployment, accident, and retirement benefit plans are becoming increasingly important subjects of collective bargaining. About 3,000,000 workers are now covered by such plans, and the National Labor Relations Board has held that pension and group health and accident insurance benefit plans are matters on which employers and unions have the statutory duty to bargain. The Taft-Hartley Act makes a decided impact on the execution and enforcement of such plans.

Payments made by an employer to a union for inclusion in a fund to be used to insure the employees against illness, accident, unemployment, etc., are regulated by Section 302, the employer and the union being subject to criminal sanctions for violations. Thus both the disbursement and the receipt of such funds are illegal unless the money goes into a trust established for the sole benefit of the employees of the employer making the payment, their families, and dependents (although the money may be used for the benefit of the employees, their families, and dependents of the contributing employer jointly with the employees, their families, and dependents of other employers who contribute). Moreover, (a) the payments must be held in trust for medical or hospital care, pensions on retirement or death, compensation for occupational illness or injury (or insurance to provide any of these), unemployment benefits, life insurance, disability and sickness insurance, or accident insurance; (b) there must be a written agreement between the union and the employer specifying the detailed basis of payment, providing for joint and equal administration, with neutral parties to settle disputes, and providing for an annual audit; and (c) the payments to

be used to provide pensions or annuities must go into a separate trust fund earmarked for no other purpose.

There are three exemptions to these requirements.

In the first place, no agreement in effect on June 23, 1947, was affected until July 1, 1948, or its expiration, whichever was sooner. In the second place, contributions to welfare funds established before January 1, 1947, and providing for pooled vacation benefits are not unlawful on that ground. In the third place, contributions to trust funds established by collective agreement prior to January 1, 1946, but not containing the written stipulation detailing the basis of payment, providing for joint administration, etc., are immune—if otherwise lawful.

The restrictions on the execution of welfare-fund agreements have four distinguishing characteristics. First, they limit the use of the money in the fund to benefits for the employees of employers who made contributions, thus making illegal the lumping of all the money into a general fund for disbursement to a union member whenever he is in need, regardless of whether his employer made any contribution. In short, certain types of multi-employer or industry-wide funds are proscribed. Second, they limit the purposes for which the funds may be expended. Third, they provide for joint administration; and fourth, they protect the interests of the beneficiaries by making the fund a trust and providing for an annual audit.

The National Bituminous Coal Agreement meets the terms of Section 302 (1) by providing for tripartite administration (operators, union, and a neutral); (2) by limiting payments to employees and/or their dependents to medical and hospital care, pensions on retirement or death, compensation for occupational illness or injury (or insurance for any of these), and for wage losses not adequately covered by state or federal law; (3) by making the fund an irrevocable trust; and (4) by providing for an annual audit.

Any person who wilfully violates Section 302 is subject to conviction for a misdemeanor, with maximum punishment of $10,000 fine, one year in jail, or both.

The Norris-LaGuardia Act is not applicable to a petition for an injunction or a temporary restraining order to prevent violations of this section. Federal courts are, subject to Section 17 of the Clayton Act relating to notice to respondents, given jurisdiction

to restrain these violations without reference either to Section 6 and 20 of the Clayton Act or to the Norris-LaGuardia Act.

COMMENT

Section 302, like Sections 8 (b) (6) prohibiting certain types of featherbedding and Sections 8 (a) (3) and 8 (b) (2) regulating union security, invades the collective bargaining process itself by limiting the terms of the agreement. Since collective bargaining is a private institution and device for the development of sound labor-management relationships, as distinguished from governmental regulation, rules of law which constitute an invasion of the private area of agreement require careful appraisal and justification in the light of basic policy. Presumably our federal labor policy is based on the assumption that the establishment and maintenance of collective bargaining relationships is in the public interest and that once a relationship is established and is functioning the government's interest, except as an observer and occasional conciliator, ceases. Hence, the parties are free to work out the terms of the relationship—wages, hours, work rules, seniority, etc.,—and to resolve questions arising during the life of the agreement through machinery privately established and enforced. Since bargaining necessarily means the freedom to disagree as well as to agree (otherwise it would not be bargaining at all, but imposition by one party and acceptance by the other), the employers and the union need status and power, which means, among other things, that they are free to resort to private economic weapons, e.g., the lockout and the strike, to back up their respective demands. The alternatives to free collective bargaining are either individual bargaining—that is, the emasculaton of trade-unions—or governmental regulation of the terms of the agreement. The former alternative is obviously not feasible at this stage of our economic, social, and political development; the latter alternative is generally abhorrent since it implicitly means governmental regulation of the heart of the contract, that is, wage-fixing and ultimately price-fixing and profit regulation.

Accordingly, unless the government is through legislation merely throwing its weight on one side of the bargaining table or the other, according to the fluctuations of the political cycle, any regulation of the terms of the collective agreement should be justified by clear policy considerations. Thus minimum wage-maxi-

mum hour legislation, workmen's compensation acts, health and safety laws, etc., which operate on the periphery of collective bargaining and strike only at extremes, are generally accepted as necessary intervention. Similarly, restrictions on certain types of featherbedding are thought to be consistent with long-range public interest. But blanket restrictions on union security are not, assuming that collective bargaining is, consistent with the public interest. Such prohibitions represent, not regulation based on collective bargaining as federal labor policy, but governmental intervention on the employer's side of the table. Moreover, they are an expression of the philosophy that trade-unions are not to any significant degree the same thing as the employees but are, like employers, merely engaged in competition for the workers' loyalty. Since a well-developed and established trade-union does have an institutional life separable from the identities of its individual members and frequently is motivated by internal political considerations, that is, considerations of how to curry the workers' favor and gain or secure their loyalty, there is some validity to this philosophy. Yet many unions do, in fact as well as in theory, belong to the members. They are political, economic, and socal organizations established by, and functioning in behalf of, those members.

The restrictions of Section 302 express the notion that trade unions are foisted upon, not built by, employees. The prohibitions placed upon the check-off of dues are not particularly significant, as the Bituminous Coal Agreement indicates. The fact is that some union leaders oppose the use of the check-off on the grounds that it undermines the strength of the union by removing one of the periodic contacts between the organization and its members, by inducing lethargy on the part of union leaders, and by misleading the officers as to the degree of rank and file support they and the organization have. But a proper and accurate conception of trade-unions fails to reveal any valid reason why the negotiators should not be free to agree to a check-off if they wish to. The check-off imposes no great burden on the employer. Moreover, he doesn't have to agree to it; it is a bargainable issue. And if the employees dislike the check-off, they have alternatives open to them through the internal operations of the union. They can express their disapproval in meetings, reject the contract which contains the check-off, or get rid of the officers who negotiated it. This assumes, of course, a democratically operated union, an assumption which is

not always well founded. The internal operations of unions need legislative examination with an eye toward corrective measures, but the Taft-Hartley Act largely ignores this area and centers its attacks on the institutional arrangements of unions, the terms of their agreements, and the use of their traditional economic weapons. Hence, the statute expresses a fundamental confusion, accepting the general policy statements of the Wagner Act but, instead of accepting trade-unions as institutions and directing attention to their improvement, concentrating on weakening them as a party to the bargaining process. Hence, the statute serves in large part as an intervener on the side of employers rather than as a legislative device for strengthening the effective and equitable operation of collective bargaining.

The objections to Section 302 insofar as it regulates the execution and operation of welfare-fund agreements are more serious than the objections to the restrictions on the check-off. There is no valid complaint insofar as the section protects the beneficiaries by making the fund a trust and providing for an annual audit. But there is less reason for prohibiting the expenditure of funds for the benefit of an employee unless the funds were paid in by one of his employers, past or present. And there seems to be no reason at all for limiting the purposes for which such money may be disbursed. The fact that Congress inserted a saving clause excluding from these limitations agreements executed before January 1, 1947, and providing for pooled vacation benefits indicates the lack of wisdom of such inflexible rules. Equally objectionable is the provision requiring joint administration by employers and unions. Undoubtedly the employer, since he is making all or part of the contribution and since the employees are his, has some interest in the matter. But the beneficiaries of the fund are the workers, and their representative is the union, not the employer. Protection of the employees' interests does not require joint administration. Actually, in terms of the theory of collective bargaining, writing a legislative rule excluding the employer from administration seems sounder than imposing a regulation requiring his inclusion. It can be persuasively argued that administration of a welfare fund should properly lie solely between the union members and the union trustees, particularly since the employer can express his interest at the bargaining table when the terms of the fund, its purposes, size, etc., are established. But rather than impose any statutory rules at all, it

would seem wise to minimize governmental intervention (in the absence of policy considerations which require it) and to leave the issue of administration to resolution at the bargaining table.

THE BAN ON POLITICAL CONTRIBUTIONS

By terms of an amendment to the Federal Corrupt Practices Act which comprises Section 304 of the Taft-Hartley Act it is a crime for "any corporation whatever, or any labor organization to make a *contribution or expenditure in connection with*" any election, including primaries, political conventions, and caucuses, at which presidential and vice-presidential electors, senators, representatives, or delegates or resident commissioners to Congress are to be voted for or selected. It is also a crime for a candidate, political committee, or other person to accept or receive any prohibited contribution.

Any corporation or labor organization found guilty of violating this section can be fined up to $5,000, and every officer or director who consented to the contribution or expenditure that constituted the violation can be fined up to $1,000 and/or imprisoned for a maximum of one year.

The word "contribution" (which is carried over from the War Labor Disputes Act) has a fairly clear factual content.If a corporation or a labor union gives a candidate for the Senate $50,000 for campaign purposes, it has obviously made a "contribution" and committed a crime. Moreover, the candidate has committed a crime by accepting the money. If a corporation or a labor union pays for a candidate's political advertisements in newspapers of general circulation or on the radio, it has made a "contribution" and violated the law.

The meaning of the word "expenditure" is not, however, quite so clear. Its ambiguity was discussed in a debate on the floor of the Senate on June 5, 1947, between Senators Taft, Ball, Pepper, Barkley, and Magnuson.[6] The inquiring senators pointed out to Taft that most newspapers are run by corporations, that a newspaper which makes an editorial comment in favor of one candidate or against his opponent has made an "expenditure in connection with" his election, and that this kind of expression of opinion—generally thought to be an exercise of freedom of press—is quite possibly a crime under the statute.

[6] *Congressional Record*, Senate, pp. 6593-6598.

Senator Taft insisted in his reply that the primary objective of the provision is to stop unions from using their duespayers' contributions for political purposes. Thus, according to Taft, although it is a crime for any labor organization publishing a newspaper which is financed from the funds contributed by its members as dues and fees to run the voting record of a candidate and recommend his defeat or election, it is not a crime for a corporation publishing a newspaper for profit,[7] or financing it by advertising and subscriptions, to do precisely the same thing.

Since daily newspapers are usually published for a profit or financed by advertising and subscriptions, but union newspapers frequently are not, the intent of this section, following the Taft interpretation, is to muzzle the labor press. Presumably unions can, however, circumvent the law by buying daily newspapers and shaping their editorial policies to the political ends they desire.

In addition, the section does not, again according to Taft, aim at organizations like the C. I. O.'s Political Action Committee which receives *direct* contributions from union members who know that the money will be used for political purposes. Moreover, the P. A. C. is not a labor organization as defined in the statute.

As might be expected, unions have resisted this section of the Taft-Hartley Act. In the first test case in this connection, a federal district court held the section unconstitutional on its face. The case arose when Philip Murray, president of the C. I. O., signed an editorial on the front page of the July 14, 1947, issue of the *C. I. O. News,* a weekly union publication, urging all C. I. O. members living in the Third Congressional District of Maryland to vote for Edward A. Garmatz, a candidate for Congress in a special election. According to the indictment (drawn against both Murray and the C. I. O.) an extra 1,000 copies of the issue were sent to Baltimore for distribution.

Subsequently the United States Supreme Court reviewed this decision. The majority of the justices, while agreeing with the trial judge's conclusion that Murray and the C. I. O. were not guilty, did so for different reasons. They avoided a square declaration on the constitutionality of Section 304, pegging their decision on the

[7] A. J. Liebling, commenting in the *New Yorker,* August 16, 1947 (page 67), reduced this distinction *ad absurdum* by asking whether or not the amendment applies to daily newspapers which are not published for profit, e. g., *The Christian Science Monitor,* and newspapers which are supposed to make a profit but do not, e. g., the defunct *PM.*

narrower ground that the section does not cover such activities. *United States v. Congress of Industrial Organizations and Philip Murray,* 22 LRRM 2194 (1948). The decision represents, at least in part, a rejection of the Taft interpretation of Section 304.

STRIKES BY GOVERNMENT EMPLOYEES

Under Section 305 any person employed by the United States or any agency of the United States (including wholly owned government corporations) who participates in a strike commits an unlawful act. The penalty is immediate discharge, forfeiture of civil service status, and ineligibility for reemployment by the United States or any agency of the United States for three years. Strictly speaking, this is not criminal law, but the sanctions are entirely punitive.

INTERFERING WITH THE BOARD

Under Section 12 any person who wilfully resists, impedes, prevents, or interferes with any member or agent of the Board in the performance of his duties commits a crime punishable by a maximum fine of $5,000 and/or imprisonment for not more than one year.

CHAPTER III

Conclusion

THE VICTORY in the 1948 presidential election of a political party committed to repeal of the Taft-Hartley Act has placed the future of federal labor policy in the area of speculation. There is little doubt that the 1947 statute will be substantially amended. For reasons of expediency, the amending process may take the form of an outright repeal of the Taft-Hartley Act followed by a substitute bill based on the policies of the Wagner Act. But whether the 1947 Act is directly amended or repealed and replaced by a new law makes little difference, except politically. The real question is: What shape and substance will the amendments take?

Basically, federal labor policy is certain to remain as is, that is, the policy will continue to be one of encouraging the establishment and maintenance of collective bargaining relationships. The schizophrenic features of the Taft-Hartley Act, i.e., those aspects of the statute that are in conflict wth that basic policy, are almost sure to go. Specifically, the rules of law giving the right not to engage in union activity equal status with the right to engage, restraining physically noncoercive organizational and strike-support activities, and severely restricting union security, are probably headed for discard. The character of other alterations is a matter of conjecture.

The trade-unions themselves, returned to a position of political influence, are confronted with an almost overwhelming temptation to demand simply the outright repeal of the Taft-Hartley Act and a return to the Wagner Act. In fact, since their campaigning was so largely based on the Taft-Hartley Act and since they have generally overstated the case against the statute, they are in a position where they can do little else. Yet, looking at policy considerations alone and accepting in full the thesis of the Wagner Act, it is perfectly clear that re-enactment of the 1935 statute is not adequate. These are different times, and twelve years experience under the Wagner Act furnished ample evidence of deficiencies. The Eightieth Congress overcorrected those deficiencies, but violent reaction in the opposite direction is no answer to the extremes of the Taft-Hartley Act. How much of what organized labor demands the

Eighty-first Congress will deliver is a question impossible to answer. Since these legislators will be sensitive to political pressures, as legislators always are, they will certainly not act entirely on the basis of policy considerations. But one can always hope that the legislative process will turn out statutes based as much on other factors as they are on political pay-offs and reprisals.

Some attention should be given to the internal operations of unions and the general relationship between the organizations and their members, with an eye toward corrective measures—particularly in closed shop situations, not in a spirit of weakening the institutional fabric of trade-unions but in an effort to make them more effective instruments for the achievement of industrial democracy. Industry-wide bargaining, since it has deep implications for the future of the society, needs examination in the light of what empirical data are available. The requirement of a non-Communist affidavit should be evaluated against the results it has produced. Perhaps it should also be imposed upon employers, if only in order to remove the snide innuendo against trade-union loyalty to American institutions that the present one-sided arrangement carries. There is much to be said for eliminating the affidavit requirement entirely on the grounds that any gains it has produced are outweighed by the administrative problems it has created. The ban on political contributions should be clarified so that there is no doubt that only direct financial contributions are proscribed, although the propriety of dealing with such matters at all in legislation designed to improve labor-management relations is doubtful. The scope of the statute's coverage over persons should be increased. Thus, for example, supervisors and their unions should not remain outside the ambit of the act. The risk imposed upon "economic" strikers should be reduced, so that they are not automatically ineligible to vote as soon as they are permanently replaced. The provisions making unions suable as entities, with liability limited to the organization's assets, should be retained, although the ambiguity causing doubt as to their constitutionality should be removed. Similarly, there are insufficient reasons why the collective bargaining agreement, despite the limitations of such enforcement, should not continue to have legal status, although it would seem preferable to limit liability to violation of a promise to submit a labor dispute to arbitration and to vest the responsibility for enforcement in the hands of the NLRB rather than in the courts. Moreover, the requirement

that a union must bargain collectively in good faith should be carried forward in any new law.

Administratively, the double-headed character of the investigative, hearing, and enforcement machinery of the National Labor Relations Act should be eliminated, with the General Counsel losing his independent status and returning to a position under the NLRB. Generally, Board procedures, including the rules of evidence and subpoena powers, should revert to Wagner Act status. The scope of court review can be settled by employment of the language of the Federal Administrative Procedure Act, with removal of the troublesome and ambiguous "preponderance of evidence" language of the Taft-Hartley Act. The "free speech" section clearly needs amendment, so that there is no doubt that opinions can be used as evidence. Moreover, the Board should be free to base an unfair labor practice finding on opinions, arguments, and viewpoints which, viewed under all the circumstances, contain threats or promises, implied or express. Thus any doubt surrounding the validity of the "totality of conduct" doctrine would be removed. The Board should retain its power to obtain prehearing injunctions in unfair labor practice cases, and the Norris-LaGuardia Act should not serve as a bar, although its procedural safeguards should be made applicable. But rigging the statute against one side by placing a priority on dealing with certain unfair labor practices and making it mandatory to petition for an injunction in those cases is inequitable and should be deleted. The NLRB should also be free to employ flexible procedures, such as the consent crosscheck, to resolve representation questions.

Generally, the policy underlying a new law should be one of minimizing governmental interference with the collective bargaining process itself. Thus the restrictions on the execution and enforcement of welfare-fund agreements should be relaxed. Some restrictions on the use of economic weapons by unions need to be retained. Secondary boycotts should not be illegal simply because they are secondary boycotts. Such a broad proscription prohibits resort to economic weapons in cases where their use is necessary in order to protect union standards throughout an industry. But, like strikes, they should be proscribed when they are designed to force an employer to commit an unfair labor practice. The confusion surrounding the status of peaceful picketing, particularly when conducted for well-accepted and legitimate labor objectives such as

recognition or better working conditions, should be cleared up by making it lawful in such situations. Making certain types of union unfair labor practices grounds for damage suits but imposing similar double liability for no employer unfair labor practices is pure discrimination and should be eliminated.

On the other hand, the provisions dealing with national emergency disputes and jurisdictional work fights require careful reexamination. Despite obvious defects in the existing procedures, some kinds of rules ought to be formulated and legislated in these areas. However, with respect to the jurisdictional work dispute, it seems clear that coverage should be limited to arguments between two or more unions. The existing provision restricts efforts by unions to get jurisdiction over work tasks which the employer assigns to nonunion members of a "trade, craft, or class." Thus, the section throws the weight of the law on the side of management in a phase of the bargaining process and seriously restricts a union's power to prevent an employer from undermining it by assigning work to unorganized employees.

Basically, it should be kept in mind during any consideration of federal labor policy that there are real limitations to what can be achieved by law. Cyrus Eaton, Cleveland banker and industrialist, has remarked: "One of our peculiar national traits is a pathetic eagerness to believe that passage of a law will solve any problem we have."[8] In fact, labor-management relations in a free society are not, in the last analysis, contingent upon any law, but upon the parties themselves. Law can implement the achievement of a basic policy—such as the establishment and maintenance of collective bargaining; it can formulate some rules within the framework of which the game is to be played; it can aid in the resolution of certain questions by establishing well-defined and well-accepted procedures; and the government through law can pursue fiscal policies which minimize the economic conflicts which underly many disputes. But once a collective bargaining relationship is established, its success or failure, in terms of productivity as well as of industrial peace, depends upon labor and management, not upon the law. If the government gets into the business of dictating the terms of settlement, or intervening on behalf of one of the parties by, for

[8] Eaton, *A Capitalist Looks at Labor,* 14 UNIVERSITY OF CHICAGO LAW REVIEW 335 (April, 1947).

example, challenging the status of the other party or cutting away its power, or imposing standards of productivity and efficiency, it has abandoned the policy of collective bargaining and has moved labor relations into the area of either political settlement or governmental regulation. Perhaps collective bargaining will ultimately fail, but available data do not lead to that conclusion, and in light of the unhappy alternatives, the policy merits continuation.

APPENDIX

Text of
Labor Management Relations Act of 1947

REPRODUCED BY OFFSET LITHOGRAPHY

[PUBLIC LAW 101—80TH CONGRESS]

[CHAPTER 120—1ST SESSION]

[H. R. 3020]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or

goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SEC. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act

explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(4) The term 'representatives' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 8.

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

"(10) The term 'National Labor Relations Board' means the National Labor Relations Board provided for in section 3 of this Act.

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"(12) The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance;

(iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

"(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

"NATIONAL LABOR RELATIONS BOARD

"SEC. 3. (a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board

members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

"SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

"SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

"SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected

by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.

If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by

a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear

in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved

party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

"(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe

such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

"INVESTIGATORY POWERS

"SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any

Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

"(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

"(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

"(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

"SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or

diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

"SEC. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

"SEC. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

"SEC. 17. This Act may be cited as the 'National Labor Relations Act'."

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the

authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of $12,000 per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry

out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (U. S. C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director

shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods

for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene

the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust

fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., title 29, secs. 101–115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTION ON POLITICAL CONTRIBUTIONS

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

STRIKES BY GOVERNMENT EMPLOYEES

SEC. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

TITLE IV

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

SEC. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor-Management Relations (hereafter referred to as the committee), and to be composed of seven Members of the Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives. A vacancy in membership of the committee shall not affect the powers of the remaining members to execute the functions of the committee, and shall be filled in the same manner as the

original selection. The committee shall select a chairman and a vice chairman from among its members.

SEC. 402. The committee, acting as a whole or by subcommittee, shall conduct a thorough study and investigation of the entire field of labor-management relations, including but not limited to—

(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus systems;

(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

(4) the labor relations policies and practices of employers and associations of employers;

(5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;

(6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;

(7) the administration and operation of existing Federal laws relating to labor relations; and

(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

SEC. 403. The committee shall report to the Senate and the House of Representatives not later than March 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable, and shall make its final report not later than January 2, 1949.

SEC. 404. The committee shall have the power, without regard to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers, experts, and employees as it deems necessary for the performance of its duties, including consultants who shall receive compensation at a rate not to exceed $35 for each day actually spent by them in the work of the committee, together with their necessary travel and subsistence expenses. The committee is further authorized, with the consent of the head of the department or agency concerned, to utilize the services, information, facilities, and personnel of all agencies in the executive branch of the Government and may request the governments of the several States, representatives of business, industry, finance, and labor, and such other persons, agencies, organizations, and instrumentalities as it deems appropriate to attend its hearings and to give and present information, advice, and recommendations.

SEC. 405. The committee, or any subcommittee thereof, is authorized to hold such hearings; to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress; to require by subpena or otherwise the attendance of such witnesses and the production of such books, papers, and documents; to administer oaths; to take such testimony; to have such printing and binding

done; and to make such expenditures within the amount appropriated therefor; as it deems advisable. The cost of stenographic services in reporting such hearings shall not be in excess of 25 cents per one hundred words. Subpenas shall be issued under the signature of the chairman or vice chairman of the committee and shall be served by any person designated by them.

SEC. 406. The members of the committee shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the committee, other than expenses in connection with meetings of the committee held in the District of Columbia during such times as the Congress is in session.

SEC. 407. There is hereby authorized to be appropriated the sum of $150,000, or so much thereof as may be necessary, to carry out the provisions of this title, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

SEPARABILITY

SEC. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the

remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

JOSEPH W. MARTIN JR.
Speaker of the House of Representatives.

A H VANDENBERG.
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U. S.,
June 20, 1947.

The House of Representatives having proceeded to reconsider the bill (H. R. 3020) entitled "An Act to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes," returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest: JOHN ANDREWS
Clerk.

I certify that this Act originated in the House of Representatives.
JOHN ANDREWS
Clerk.

IN THE SENATE OF THE UNITED STATES,
June 23 (legislative day, April 21), 1947.

The Senate having proceeded to reconsider the bill (H. R. 3020) "An Act to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, and passed by the House of Representatives on reconsideration of the same, it was

Resolved, That the said bill pass, two-thirds of the Senate having voted in the affirmative.

Attest: CARL A. LOEFFLER
Secretary.